United States Court of Appeals

for the Second Circuit

APPENDIX

No. 76-1282

United States Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA,
APPELLEE,

v.

LOUIS C. OSTRER,
DEFENDANT, APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

Appendix to Brief of the Defendant-Appellant.
Volume I.
(Pages 1 thru 352.)

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UNITED STATES COURT OF APPEALS
FILED
SEP 13 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

PAGINATION AS IN ORIGINAL COPY

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CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

Edelstein, Ch. J.

71 CRIM. 558

15

U. S. Form No. 10 Rev.

JUDGE EDELSTEIN

TITLE OF CASE

ATTORNEYS

THE UNITED STATES

vs.

For U. S.:

1. ANTHONY SOLDANO - ALL CTS.
2. JOHN DIGHARDI - ALL CTS. ~~except 7,8,14,15,18,19,23,29,32,36,38,39~~ ROBERT G. MORVILLO, AUSA
3. GARY FREDERICKS - ALL CTS. ~~except as to Cts 2 & 11~~
4. MICHAEL HELLERMAN - ALL CTS.
5. MICHAEL CARICATO - ALL CTS.
6. FRED GOODMAN - ALL CTS.
7. RICHARD GREENBERG - ALL CTS.
8. LOUIS OSTRER - ALL CTS.
9. MORRIS WINTER - ALL CTS. (Nolle as to Ct. 1 only)

For Defendant:

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 2 mailed ✓	Clerk		12/1/72	A. Soldano	5 —	
			12/5/72	U.S. Treas		5 —
J.S. 3 mailed 1/3/73	Marshal		1/12/73	Goldberg J	5 —	
6, 8, 5, 7, 9 -			1/12/73	U.S. Treas		5 —
Docket fee			1/18/73	Cash	5 —	
Prior Comp # 70-1947			2/8/73	U.S. Treas		5 —
Title	J. Dighardi - Fined $30,000		7/1/73	Caricato	100 —	
			7/12/73	2 Defts		162 —
Sec.			7/24/73	Caricato	100 —	
see below			7/24/73	1 Defts		100 —
			7/27/73	Goodman	15 —	
			7/27/73	2 Defts		15 —
			8/11/73	Caricato	100 —	
FORTY COUNTS			8/14/73	1 Defts		100 —
			10/4/73	Caricato	100 —	
			10/4/73	1 Defts		100 —
			10/4/73	Caricato	100 —	
			10/4/73	1 Defts		100 —
			10/5/73	Caricato	100 —	
			10/5/73	1 Defts		100 —
			10/11/73	Caricato	100 —	
			10/11/73	1 Defts		100 —

DATE	PROCEEDINGS
	T. 15, U.S.C., Sec. 77q(a) and 77x and T. 18, U.S.C., Sec. 2 Unlawfully in the offer & sale of securities employed devices which operated as a fraud & deceit upon the purchasers who were induced to purchase said securities. (Cts. 2 thru 10) T. 15, U.S.Code, Secs. 78j(b) and 78ff; T. 18, U.S.C., Sec. 2 Unlawfully in connection with the purchase & sale of securities used manipulative & deceptive devices & contrivances in contravention of the rules & regulations of the S.E.C. (Cts. 11 thru 23) T. 18, U.S.C., Secs. 1341 and 2 Unlawfully using the mails in furtherance of said scheme & artifice to defraud. (Cts. 24 to 40, incl.) T. 18, U.S.C., Sec. 371 Unlawfully conspiring so to do. (Ct. 1) (TOTAL - 40 COUNTS)
5-27-72	Filed Indictment.

DATE	PROCEEDINGS
6-1-71	ANTHONY SOLDANO-Robert Nasanof, Esq. assigned as atty under CJA. by Comm Lawrence Kessler of counsel. Deft. pleads Not Guilty. Bail of $10,000 on 71Cr-99 to be rewritten to cover this indictment. Bail limits to include Eastern Dist. of NY. Paroled until 4pm today to post bail.
	MICHAEL CARICATO-Pleads Not Guilty. Ordered photographed & fingerprinte Released on own Recognizance.
	LOUIS OSTRER-Pleads Not Guilty. Ordered photographed & fingerprinted. Bail fixed at $10,000 unsec.PRB. Submit order extending bail limits to include continental US. Paroled until 4PM today to post bail.
	MICHAEL HELLERMAN-Pleads Not Guilty. Ordered photographed & finger-printed. Bail of $10,000 surety bond plus $500 PRB on other indict-ments to be rewritten to cover this indictment. Paroled until 4PM today to post bails. All motions ret. in 10 days.
	FRED GOODMAN-David Blackstone, Esq. assigned as atty under CJA. Pleading adj'd to 6-7-71.
	RICHARD GREENBERG-Abraham Solomon, Esq. assigned as atty under CJA. Pleading adj'd to 6-7-71.
	JOHN DIOGUARDI- GARY FREDERICKS- Pleadings adj'd to 6-7-71. MORRIS WINTER-- McGOHEY, J.
6-2-71	JOHN DIOGUARDI- Filed notice of appearance by Jay Goldberg, 535 Madision Ave, N.Y.C. Tel: 752-6655.
~~6-2-71~~	
6-2-71	LOUIS OSTRER- Filed Unsecured Personal Recognizance Bond in the sum of Ten Thousand ($10,000.00) Dollars. Signed and acknowledged before John Livingston, Clerk By: E. Aponte, Deputy Clerk
6-3-71	MICHAEL HELLERMAN- Filed notice of appearance Vincent L. Broderick, Esq., 477 Madison Ave, N.Y.C. 10022 of counsel Thomas Edwards, Esq. 36 W. 44th St., N.Y.C. Phone: 758-6700.
6-3-71	MICHAEL CARICATO- Filed notice of appearance by A. Martin Stuchiner, Esq., 295 Madison Ave, N.Y.C. 10017 Phone: 532-2656.
6-3-71	LOUIS OSTRER- Filed notice of appearance by Maurice Edelbaum Phone: 732-1300
6-2-71	LOUIS OSTRER- Filed order for enlargement of deft's bail limits to permit him to travel from the Southern District of N.Y. throughout the continental U.S. (mailed notice) so ordered EDELSTEIN, J.
6-2-71	JOHN DIOGUARDI- Filed affidavit of Robert G. Morvillo, AUSA for a writ of habeas corpus ad pros. Issued writ ret 6-7-71.
6-7-71.	Richard Greenberg- Filed CJA Form # 2 order appointing counsel A. Solom 95 Baxter St. NYC - tel. 431-6542(copy mailed to Was (Nunc Pro Tunc as of June 1, 1971) RYAN, J.
6-7-71.	Joh Dioguardi-) Pleading adjourned to June 10,1971 and referred to Gary Fredericks) Judge Edelstein. Fred Goodman--) RYAN, J.
6-7-71	R.GREENBERG, MORRIS WINTER-Plead not guilty.R.O.R.---

DATE	PROCEEDINGS
6-10-71	MORRIS WINTER- Filed notice of appearance by Murray C. Gottesman, Esq., By: Jack J. Elkin, Esq., 217 B'way, N.Y.C. 10007 Phone: Wo 4-5217.
6-11-71	ANTHONY SOLDANO- Pleading and securing of new counsel adjourned to June 24, 1971 at 10:00 A.M.
	JOHN DIOGUARDI-Produced on writ- Barry Garfinkel assigned as counsel under C.J.A. Writ adjourned to June 24,1971.
	GARY FRIEDINECKS- Robert Mitchell, Eso assigned as counsel under C.J.A.
	FRED GOODMAN- Pleads Not Guilty. Bail fixed at $5,000.00. Presonal recognizance bond unsecured, to be rewritten to cover this indictment and 71 Cr 499. Motions returnable Oct. 4,1971 at 2:00 P.M. as to Hellerman, Canicato, Goodman, Greenberg, Ostner and Winter. EDELSTEIN, J.
6-15-71	FRED GOODMAN - Filed unsecured personal recognizance bond in the sum of $5,000.00. Signed and acknowledged before John Livingston, Clerk. By. E. Aponte, Deputy Clerk
6-16-71	FRED GOODMAN-Filed CJA form 2 order appointing counsel, David Blackstone, Esq., 401 B'way, N.Y.C. Phone: 226-6681. (mailed orig to Adm Off Wash D.C.) EDELSTEIN, J.
6-21-71	JOHN DiGUARDI- Filed CJA form 2 order appointing counsel, Edward S. Panzer, Esq., 299 Broadway, N.Y.C. 10007 Phone: 349-6128. (MAILED: copy to Adm Off Wash D.C.) EDELSTEIN, J.
6-18-71	JOHN DioGUARDI- Deft produced on writ Edward Panzer assigned as counsel under C.J.A. Deft. pleads Not Guilty. Motions returnable Oct 4,1971 at 2:00 P.M.. Writ satisfied. EDELSTEIN, J.
6-24-71	ANTHONY SALDANO- Deft appears with atty. Pleading adj'd to July 2,1971 at 10:00 A.M.
	GARY FREDERICKS- Deft pleads Not Guilty. Released on own recognizan Robert Mitchell, Esq., assigned as counsel under C.J.A. Motions returnable Oct 4,1971 at 2:00P.M. EDELSTEIN, J.
6-25-71	GARY FREDERICKS- Filed CJA form 2 order appointing counsel, ROBERT MITCHELL, ESQ., 51 Chambers ST., N.Y.C. 10007 PHONE: Wo 2-0675. (MAILED: copy to Adm Off Wash D.C.) EDELSTEIN, J.
6-30-71	ANTHONY SOLDANO- Filed notice of appearance by ALBERT J. BRACKLEY, ESQ. 44 Court St.,N.Y.C. 11201 Phone: 625-5884.
7-2-71	ANTHONY SOLDANO- Pleads Not Guilty. Cont'd on bail. EDELSTEIN,
7-7-71	DIOGUARDI- ~~Filed Petition for Writ of Habeas Corpus~~ Writ Satisfied 6/18/71
8-10-71	JOHN DIOGURDI-Filed notice of motion for dismissal,transferral, severance, disclosure, bill of particualrs and affidavit.EDELSTEIN, J.
AUG 2 3 1971	Filed Transcript of record of proceedings, dated 6-18-71
AUG 2 6 1971	Filed Transcript of proceedings, dated 6-24-71

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DATE	PROCEEDINGS
8-27-71	FRED GOODMAN-Filed notice of motion for bill of particulars and discovery and inspection and affidavit. EDELSTEIN,J.
8-27-71	CHARGE ~~XXX~~ error
8-30-71	FRED GOODMAN filed notice of motion for consolidation of counts 3-10 with count 2 of the indictment on the ground that the aforesaid counts are multiplicious and that counts 3 thru 10 be dismissed as separate counts and affidavit. EDELSTEIN,J.
8-24-71	Filed Transcript of record of proceedings, dated 6-11-71.
9-3-71	MICHAEL HELLERMAN- filed notice of motion for order dismissing certain counts of the indictment, bill of particulars, discovery and inspection and severance and affidavit. EDELSTEIN,J.
9-3-71	MICHAEL HELLERMAN- filed memo of law in support of motions on behalf of deft. EDELSTEIN,J.
9-8-71	FRED GOODMAN- filed notice of motion for severance of the trial of the defts and affidavit. EDELSTEIN,J.
10-20-71	R. GREENBERG - filed notice of motion for bill of particulars, discovery and inspection and affdvt. EDELSTEIN,J.
10-26-71	Filed Transcript of record of proceedings, dated 7-2-71.
11/5/72	Filed Transcript of record of proceedings, dated 10-5-71
1-26-72	Filed Transcript of record of proceedings, dated 11/15/71
1/26-72	Filed Transcript of record of proceedings, dated 11/4/71
4/3/72	ANTHONY SOLDANO _ following papers received from U.S. Magistrate docket sheet Appearance Bond- $10,000.00- Public Mutual Ins. Co.
7-24-72	John Dioguardi - Filed Defts. notice of motion for an order granting deft. bail on indictment 71 CR 558 - ret. 7-26-72 or as soon as counsel can be heard.
7-24-72	John Dioguardi - Filed memo endorsed on motion filed 7-24-72: Withdrwan - Edelstein, Ch.J. (M/N)
8-30-72	Richard Greenberg-filed Govt's bill of particulars,
9-7-72	Louis Ostrer) filed affvt. and notice of motion to sever the John Dioguardi) defts. for seperate trial after the trial now Michael D. Hellerman) scheduled for Oct. 5, 1972 and for such other relied.

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DATE	PROCEEDINGS
9-8-72	Filed affidavit and notice of motion for an order permitting the substitution of Jay Goldberg as atty of record for deft John Dioguardi in place of present atty...
9-8-72	Filed memo endorsed" Granted after hearing" Edelstein.Ch.J.
9-6-72	Dioguardi- Filed affidavit of AUSA Andrew Schaffer.(writ)
9-11-72	Dioguardi.-Filed affidavit of AUSA.Andrew Schaffer. (writ)
9-13-72	L.OSTRER) Filed memo endorsed on motion to server...GRANTED...Edelstein,Ch.J. JOHN DIOGUARDI) M.C.BELLERMAN)
9-13-72 ***	J.MDDIOGUARDI - Filed opposing affdvt.of Jay Goldberg,Esq. dtd.9-11-72
9-11-72	M.CARICATO - Filed affidavit and notice of motion for severance.
9-13-72	M.CARICATO - Filed memo endorsed on above motion....GRANTED...Edelstein,Ch.J.
9-13-72	Severed - For trial Oct. 5,1972 - Soldano Fredericks, Goodman, Greenberg and winter to follow- Osterer &Dioguardi Deft Caricatto's Motions for a seperate trial is granted. Edelstein CH,J. .....
9-26-72	Fredrick Goodman-DEFT withdraws not guilty plea and pleads guilty to ct. 1 only pre-sentence Investigation ordered. sent. adjd. and refferred to Lasker,J. Prob. notified. Edelstein CH.J.
9-18-72	Dioguardi - Filed WHC with Marshals retur. - Writ satisfied on 9-8-72
10-4-72	Dioguardi - Filed WHC with Marshals return - Writ satisfied on 9-13-72
10-5-72	A.SOLDANO) G.FREDERICKS) R.GREENBERG) JURY TRIAL BEGUN, before Judge Knapp... COUNTS 7,8,9,10,14,16,17, 18,19,20,21,22,23,31,32,33,34,35,36,38,39 DISMISSED ON CONSENT.... M.WINTER - Severed on consent....
10-6-72	Trial cont'd.
10-10-72	Trial cont'd.
10-11-72	Trial cont'd.
10-12-72	Trial cont'd.
10-13-72	Trial cont'd.
10-16-72	Trial cont'd.
10-17-72	Trial cont'd. COUNTS 2,5,6,12,13,24 thru 30 AND 40 DISMISSED on consent.

(Cont'd on nex page)

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DATE	PROCEEDINGS
10-18-72	trial cont'd. COUNTS 3 & 11 dismissed as to RICHARD GREENBERG....
10-19-72	Trial cont'd. & concluded....A.Soldano GUILTY on cts.1,15..NOT GUILTY 3,4,11,37.. G.FREDERICK-Guilty on ct.1 Not Guilty on count 37....Richard Greenberg GUILTY on cts.1 & 15..Not Guilty counts 4,37...Pre-sentence report ordered ALL deft. Sentenced on Nov.30, 1972 Bail cont'd...Knapp,J...
11-6-72	MICHAEL HELLERMAN-Filed Judgment(Atty.present)It is Adjudged that imposition of sentence be suspended and the deft is placed on probation for a period of FIVE(5)YEARS to be served CONSECUTIVELY and not concurrently with the sentence imposed under 70Cr.967, the period of said probation to commence at the expiration of the custody served under 70Cr.967. The probation so imposed shall be subject to the standing probation order of this Court and to the special conditions that 1) the deft shall not engage in the securities business or act as an advisor to any one other than the members of his immediate family 2) the deft shall make available a fund of $12,500.00. to be used towards the restitution of his victims to the extent that they can be identified and in accordance with a plan of ~~xxxx~~ restitution to be approved by his Probation Officer. Open counts 1 through 14 and 16 through 40 are dismissed on motion of deft....Lasker,J.
11-28-72	Dioguardi & Ostrer - Filed govt's affidavit and notice of motion for an order to sequester the jury at the trial. ~~xx~~
11-30-72	ANTHONY SOLDANO-Filed Judgment(atty.present)deft is committed to custody of the Atty. Gen.for imprisonment for a period of TWO YEARS on ct.15. Imposition of sentence is suspended on Ct.1, deft is placed on probation for a period of THREE YEARS, Subject to the standing probation order of this Court. Probation to commence upon expiration of confinement. The deft is cont'd on present bail until 12-11-72 at 10 a.m. at which time the deft is to surrender to the U.S.Marshal...Knapp, J.
11-30-72	GARY FREDERICKS -Filed Judgment(Atty.present)the Imposition of sentence is suspended. Deft is placed on Probation for a period of TWO YEARS, subject to the standing probation order of this Court..Knapp, J.

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DATE	PROCEEDINGS
11-30-72	RICHARD GREENBERG -Filed Judgment(atty.present)deft is committed to the custody of the Atty.Gen.for imprisonment for a period of THIRTY DAYS on count 15. Imposition of sentence is suspended on ct.1, deft is placed on probation for a period of TWO YEARS, subject to the standing probation order of this Court. Probation to commence upon expiration of confinement. Deft is cont'd. on present bail until Jan.2,1973, at 10 a.m. at which time the deft is to surrender to U.S.Marshal...Knapp, J.
12-1-72	Dioguradi- Filed affidavit of May Goldberg, atty. for deft.
12-1-72	SOLDANO - Filed notice of appeal to the USCA for the 2nd Circuit from judgment 11-30-1972 (mailed copies to US Atty's office and defendant.)
12-6-72	Soldano- (atty. present) Motion for bail pending appeal. Denied.Deft's motion to extend time of surrender until 1-3-73 at 10:00 A.M.-GRANTED. Knapp, J.
12-6-72	Richard Greenberg - Filed notice of appeal to the USCA for the 2nd Circuit from judgment entered 11-30-72 - leave to appeal in forma pauperis is hereby granted - Knapp, J. (mailed copies to deft. and US Atty's office.)
12-11-72	Hellerman- Filed affidavit and notice of motion requiring the Govt. to produce list of all cases investigated or under investigation relating solely to the conduct of M. Hellerman,copie copies of indictments where he is or was a co-conspirator o participant. etc.
12-15-72	Filed Transcript of record of proceedings, dated 10-19-72
12-14-72	Filed Transcript of record of proceedings, dated 11-8-72
12-19-72	Filed Goverments trial memorandum
12-13-72	Filed Transcript of record of proceedings, dated 10-13,16,17,18-1972
12-20-72	Dioguardi & Ostrer-Filed Govt's affidavit in opposition to Dioduardi's bail applicatdon.
12-20-72	Dioguardi & Ostrer-Filed Govt's memorandum of law in connection with motion for discovery.
12-20-72	Dioguardi & Ostrer-Filed Govt's memorahdum of law in connection with cross-examination of deft. Ostrer.

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#8

DATE	PROCEEDINGS
1-2-73	Dioguardi-Filed affidavit , to wai[illegible]ht of seeking mistrial, etc.
1-2-73	Oster- Filed affidavit and notic[illegible] motion for severance.
1-2-73,	Oster- Filed memorandum of law in behalf of deft's motion.
12-27-72	Dioguardi & Oster-Filed affidavit for writ of habeas corpus. writ issued 73
12-29-72	Dioguardi-Filed affidavit by AUSA Andrew Schaffer.
1-4-73	Ostrer-Filed memo endorsed on motion for severence. Motion denied. Edelst
1-8-73	Filed order-Dr. Luis Blitzman M.D. be employed to make such examination of John M. Kelsey to determine his physical ability to appear as a witness & said physician submit to the court a report as to Mr. Kelsey's ablilty Mr. John M. Kelsey submit himself to exam. by said physician at such tim & place as hall be specified by said physician.--The U.S. Atty be directe to pay a reasonable fee for the services,not to exceed the sum of $200.00--Edelstein, J.
1-10-73	Filed CJA Form 20 approving payment to Abraham Solomon, Esq. in rep'ing def. RICHARD GREENBERG, signed by Knapp, J. and countersigned by Friendly CCA 2d.
1-11-73	Soldano-Filed notice that the record on appeal has been certified and trar to the U.S.C.A.
1-4-73	Jury trial begun before Edelstein,Ch.J. as to Defts. Dioguardi and Ostrer. Deft. Dioguardi produced on a writ.
1-5-73	Trial continued.
1-8-73	Trial continued.
1-9-73	Trial continued.
1-10-73	Trial continued.
1-11-73	Trial continued.
1-15-73	Trial continued.
1-16-73	Trial continued.
1-17-73	Trial continued.
1-18-73	Trial continued.
1-22-73	Trial continued. (over)

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DATE	PROCEEDINGS
1-23-73	Trial continued.
1-24-73	Trial continued.
1-25-73	Trial continued.
1-26-73	Trial continued and concluded. DIOGUARDI-Jury Verdict: Guilty on counts 1,16,17 and 31, Mistrial on counts 9,13,14,15,18,19,28,29,32,33,34,35,36 38 and 39. Motion to dismiss granted as to counts:2,3,4,5,6,7,8,10, 11,12,20,21,22,23,24,25,26,27,30,37 and 40.
	OSTERER-Jury Verdict: Guilty on counts1,9,16,17,18,19,31 33,34,35 and 36. Not Guilty on counts 14,15,29,32,38 and 39. Counts Dismissed:2,3,4,5,6,7,8,10,11,12,13,20,21,22,23, 24,25,26,27,28,30,37 and 40.
	Pre-sentence investigations ordered. Sentences adjourned to 3-13-73 at 10 A.M. Ostrer bail continued as present. Dioguardi produced on writ. Serving prison term. Edelstein,Ch.J.
1-29-73	Filed the following papers received from chambers this date. Trial memo. in behalf of deft. Osterer (2) Filed affidavit of deft. Osterer. Filed annotated indictment. Sealed envelope containg Ex.18 ordered sealed 1-24-73,
2-5-73	Soldano-Filed ~~xxx~~ U.S.C.A. order that the argument of the appeal be heard during the week of April 16,1973. Fusaro U.S.C.A. CLK.
2-15-73	Dioguardi & Ostrer-Filed one manilla envelope ordered sealed and placed in vault rm 602. Edelstein,CH.J.
2-15-73	Dioguardi & Ostrer-Filed one manilla envelope ordered sealed and placed in vault rm. 602. Edelstein,CH.J.
2-15-73	Soldano-Mailed voucher 1 of the CJA appointing court reporters approved dtd. 11-3-72. Knapp,J.
2-15-73	Fredricks-Mailed voucher 1 of the CJA appointing court reporters approved dtd. 11-3-72. Knapp,J.

OVER

DATE	PROCEEDINGS
2-15-73	Fredericks-Filed CJA mailed copy 1 to the A.O. approved (with memorandum Knapp,J.
2-15-73	Fredericks-Mailed CJA form 5 approved sent to the A.O. Wash. D.C., Knapp,J.
2-22-73	Filed Petition for Writ of Habeas Corpus, Writ Letafied - 1/22/73.
3-6-73	Dioguardi-Filed letter dtd. 3-6-73 to Edelstein,CH.J. on a juror of men competentcy by Dr. Arnold H. Zucker.
3-6-73	Dioguardi-Filed affidavit and notice of motion for an order granting the deft a new trial.
3-1-73	Greenberg, Soldano-Filed true copy of C.A. order affirming the D.C.Judgmer as to deft Greenberg. Judgment Entered 3-1-73 Thomas E. Andrews acting-Clerk
3-8-73	[redacted] 12/20/72.
3-12-73	LOUIS OSTRER - Filed afdvt.of Maurice Edelbaum of actual engagement, with memo endorsed GRANTED - No opposition...Edelstein,Ch.J.
3-12-73	JOHN DIOGUARDI ~~LOUIS OSTRER~~ - Filed letter from Jay Goldberg dtd, 3-9-73 consenting to the above afdvt
3-12-73	Dioguardi-Filed Govt's affidavit for a writ of habeas corpus,ret 3-12-73.
3-12-73	Oster-Filed affidavit and notice of motion for a new trial.
3-12-73	Oster-Filed Government's affidavit in opposition of motion for a new trial
3-14-73	J.DIOGUARDI) L. OSTRER) Filed Govts memorandum in connection with sentencing....
3-13-73	Dioguardi-Filed affidavit for a writ of habeas corpus writ iss ret 3-19-&
3-16-73	RICHARD GREENBERG-Filed true copy of U.S.C.A. order-Ordered that a stay be and it hereby is granted pending argument of the motion for a stay pending appeal on Jan. 9, 1973 before a panel of this Court. mailed notices 3-19-73.
3-20-73	Ostre & Dioguardi-Hearing & held & concluded re-motions by both counsel Hearing adjd to April 12,1973 Decision reserved. Edelstein,CH.J.

CONT'D

DATE	PROCEEDINGS
3-23-73	Louis Ostrer-Filed motions for, Judgment of acquittal, order setting aside conviction and granting new trial.
3-23-73	Louis Ostrer- Filed memo endorsed on motions dtd 3-23-73, Motion denied after agrument. Edelstein,CH,J.
3-26-73	Dioguardi & Ostrer-Filed one manilla envelope containing transcript ordered sealed and impounded in the vault of the Clerk's office room 602. Edelstein,CH.J.
4-4-73	Filed Transcript of proceedings, dated 1-23,24,25,26,1973
4-6-73	Soldano, ~~XXXXXXXXX~~,Greenberg-Filed true copy of C.A. order (~~with Opinion attached~~) upon default on not having filed his brief and appendix it is ordered that the appeal of Anthony Soldano from the judgment of the U.S.D.C. be dismissed.
4-10-73	Goodman-Filed memo ordered sealed & impounded this date rm 602,Lasker,J
4-12-73	Ostrer-Filed memo endorsed on motion dtd 3-12-73 for new trial, Motion for a new Trial is denied in all respect opinion to follo Edelstein CH,J.
4-12-73	Dioguardi-Filed memo endorsed on motion dtd 3-12-73 for new trial Motion for a new trial is denied in all respects opinion to follow. Edelstein,CH,J.
4-10-73	F. Goodman-Filed Judgment(atty. present) It is adjudged that imposition of sentence is suspended and the deft. is placed on unsupervised probation for a period of Five(5) Years to run concurrently with 70 Cr 967 and 72 Cr 1111. Counts 2 thru 40 dismissed. (entered 4-1373) Lasker, J.
4-11-73	JOHN DIOGUARDI-Filed affdvt of H.F.McGuire for a writ of habeas corpus-Writ issued to Warden,Federal Correctional Inst. at Danbury Conn. Ret.-4-12-73.
4-12-73	JOHN DIOGUARDI-Filed Judgment(Atty.present,deft produced on a Writ)(#72,384) Deft is committed for imprisonment for a period of FIVE YEARS & FINED $10,000 on count 1. TWO YEARS & FINED $10,000 on each of counts 16 & 17. Prison sentence on counts 1,16 & 17 to run consecutively to each other and consecutively to and to begin upon expiration of sentence deft is presently serving at U.S.CORRECTIONAL INSTITUTION, Danbury, Connecticut. Total fines of $30,000 on cts.1,16 & 17 to be paid or deft to stand committed until the fines are paid or he is otherwise discharged according to law. Five Years & fined $1,000. on count 31. Execution of prison sentence on count 31 suspended. Deft placed on probation for a period of FIVE YEARS, to commence upon expiration of confinement imposed on cts.1,16 & 17, subject to the standing probation order of this Court. Payment of $1,000 fine on ct.31 is Remitted.... Edelstein, CH.J.... Entered 4-16-73

— See over —

DATE	PROCEEDINGS
4-12-73	LOUIS OSRER - Filed Judgment# 73,383)Deft is committed for imprisonment for a period of THREE YEARS on each of counts 1,9,31,33,34 & 35 to run concurrently with each other. TWO YEARS on each of counts 16,17,18 & 19 to run concurrently with each other and concurrently with sentence imposed on counts 1,9,31,33,34 and 35. Fines $10,000 on each of cts.1,16,17,18 & 19 & $5,000 on count 9. Total fines of $55,000 to be paid or deft to stand committed until the fines are paid or he is otherwise discharged according to law....Five years on count 36. Execution of sentence on count 36 suspended. Deft placed on probation for a period of ONE DAY to commence upon expiration of confinement imposed on counts 1.9.16.17.18.19.31.33.34.35 & 36. Deft contid on present bail until 4 P.M. April 13,1973 at which time he is to post a $25,000 unsecured P.R.B. pending appeal. Deft's bail limited to continental United States.....Edelstein,Ch.J.....Entered 4-16-73---
4-12-73	John Dioguardi- Filed notice of appeal to the USCA for the 2nd Circuit from judgment filed 4-12-73 (copies mailed to defendant, Attorney for deft. and US Atty
4-19-73	Filed Transcript of record of proceedings, dated JAN. 4,5,8,9,10-73
4-19-73	Filed Transcript of record of proceedings, dated JAN 11,12,15,16,17,22,23, 1973
4-12-73	LOUIS OSTRER-Filed Unsecured Personal Recognizance Bond Pending Appeal in the amount of $25,000.00---Clerk.
4-19-73	FRED GOODMAN-Filed CJA 4 copy 1 approving payment to D.Blackstone--dtd.4-12-73-Lasker,
4-19-73	Filed Transcript of record of proceedings, dated 12/6/72.
4-19-73	Filed Transcript of record of proceedings, dated 12/11/72
4-19-73	LOUIS OSTRER- Filed notice of appeal to the U.S.C.A. for the 2nd Circuit from judgment filed on 4-12-1973 (mailed copies to deft. and U.S. Atty.)
4-19-73	John Dioguardi-Filed writ of habeas corpus with Marshal's return dtd 3-
4-19-73	John Dioguardi-Filed writ of habeas corpus with Marshal's return, writ s fi .. Edelstein,Ch.J.
4-19-73	John Dioguardi-Filed writ of habeas corpus with Marshal's return,dtd 4-1 writ satisfied Edelstein,CH.J.
5-9-73	Caricato-Filed notice of appearance by atty Frederick H. Block 295 Madis AVe New York 10017 685-1161
5-9-73	John Dioguardi- Filed Commitment & entered return, Deft. Delivered to the FCI Danbur, Conn
5-15-73	MICHAEL CARICATO - Filed afdvt. & notice of motion to dismiss the indictment...
5-15-73	MICHAEL CARICATO - Filed deft's memorandum in support of motion to dismiss..
12-6-72	Filed Govt's bill of particulars.
5-17-73	Ostrer-Filed affidavit and motion for a bill of particulars and discover and inspection.
5-17-73	Ostrer-Filed memorandum of law in support of motion for particulars etc.
5-17-73	Hellerman-Filed motion dtd 9-22-71 to withdraw the pre-trial motion file 9-1-71.
5-17-73	Filed Govt's proposed examination of prospective jurors dated in January
5-17-73	Dioguardi-Filed deft request to charge dated 1-18-73.
5-17-73	Soldano-Filed transcript of record of proceedings dated 4-12-73.

DATE	PROCEEDINGS
5-24-73	Caricato- Filed reply affidavit.
5-24-73	Caricato- Filed deft's reply memorandum in support of to dismiss indct.
5-25-73	Caricato-Filed Govt's memorandum of law in opposition to motion to to dismiss indictment.
6-14-73	Filed Transcript of ... proceedings, dated March 22, 1973.
5-10-73	Dioguardi and Ostrer- Filed notice to docket clerk that the record has been certified and transmitted to the U.S.C.A. on 5-10-73
JUN 26-73	[redacted] Filed Transcript of record of proceedings, dated; Jan 4-73
2-9-73	ANTHONY SOLDANO. Filed Commitment & entered return. Deft. Delivered to the Federal Detention Hdqrts., N.Y., N.Y.
6-26-73	Filed notice-The supplemental record on appeal has this date been certified and transmitted to the U.S.C.A.
7-18-73	JOHN DIOGUARDI and LOUIS OSTRER-Filed OPINION #39,684-I do not believe that the facts justify the reopening of the jury's verdict. Defts. have not offered any evidence of a separate, unrelated determination of mental incompetency. Defts' second request that the verdict be set aside even without a hearing is utterly without foundation. A showi which is too weak to permit an inquiry into the jury's deliberations is, a fortiori, to weak to warrant a new trial. Accordingly, defts. motion is denied. So Ordered- -- Edelstein, J. Mailed notices 7-18-73.
7-18-73	MICHAEL CARICATO-Filed memo endorsed on motion filed 5-15-73 to dismiss -Upon hearing motion denied. See transcript of July 17, 1973 for findings of fact and conclusions of law---Edelstein, Ch. J Mailed notices 7-19-73.
7-19-73	Filed Gov't affdvt in opposition to deft's Caricato motion to dismiss
7-20-73	JOHN DIOGUARDI & LOUIS OSTRER-Filed one envelope containing motion for a new trial Documents sealed by order of the Court--Edelstein, Ch.J.

DATE	PROCEEDINGS
[illegible]-25-73	MICHAEL CARICATO-(atty present) Deft withdraws his plea of not guilty and pleads guilty to count 1 only. Sentence adjourned to Oct. 2 1973 at 2:30 p.m. P.S.I. ordered Form C/R signed by deft & counsel Probation Dept notified Cont'd on B.O.R.---Edelstein, Ch.J.
8-1-73	Filed Transcript of record of proceedings dtd 12-20-72
8-1-73	Filed Transcript of proceedings dtd March 8 1973
9-28-73	Filed transcript of record of proceedings dated July 25, 1973
10-2-73	MICHAEL CARICATO - Judgment #73,345 Imposition of sentence is suspended and the Deft is placed on Prob. for a period of ONE (1) YEAR subject to the standing probation order of this court, and fined $2500.00 to be paid within TWO (2) YEARS or he is otherwise discharged according to law. Payments of the fine can be arranged with the Prob. Office. Defts motion to dismiss Cts 2 thru 40 Granted, on objection by Gov't. - Edelstein, CJ.
9-28-73	MICHALE HELLERMAN - Filed amended Judgment & Order of Probation; It is adjudged that imposition of sentence be suspensed and the Deft is placed on probation for a period of FIVE (5) years be be served consecutively to and not concurrently with the sentence impos under 70Cr 967 the period of said probation to commence at the expiration of the custody served under 70 Cr 967. The probation so imposed shall be unsupervised. The Deft shall no engage in the securities business or act as an advisor to any other than the members of his immediate family and the Def't shall make available a fund of $12,500.00 to be used towards the restitution of his victims to the extend that they can be indentified and in accordance with a plan of restitution to be approved by his Probation Officer. Open Cts one through 14 and sixteen through forty are dismissed on motion of Deft.- Lasker
9-25-73	MICHALE HELLERMAN - Filed Opinion #39856, for the reasons set forth in the affidavit of Vincent L. Broderick sworn to March 3, 1973, in support of the motion, and the arguments presented orally, the motion the granted to the following extent: (1) The sentence of imprisonment under 70 Cr 967 is reduced to the period of time served to date. (2) The probation which will show now commence under 71 Cr 558 and 72 Cr 1206 shall be unsupervised. Amended judgments shall be prepared in accordance with this memorandum. It is so ordered. - LASKER, J.

DATE	PROCEEDINGS
1-18-74	JOHN DIOGUARDI- Filed Memorandum And Order regarding Deft's Bail application. Accordingly, Deft's application for Bail is denied- SO ORDERED--EDELSTEIN,C.J.
1-18-74	JOHN DIOGUARDI- Filed Defts Notice of Motion and Affidavit for the fixation of bail, and for such other and further relief as may be appropriate.
1-18-74	JOHN DIOGUARDI- Filed Gov't Memorandum Of Law in opposition to the Deft's motion for Bail application.
1-18-74	JOHN DIOGUARDI- Filed Gov't Affidavit of S. Andrew Schaffer, A.U.S.A., in reference to Deft's Bail application.
3-14-74	JOHN DIOGUARDI- Filed U.S.C.A. MANDATE with OPINION attached -- The Judgment of the District Court is affirmed - Judgment entered 3-14-74 - CLERK. (Mailed Notice)
6-5-74	JOHN DIOGUARDI-Filed transcript of record of proceedings dated 1-14-74
7-25-74	LOUIS OSTRER-Filed Govt's. affidavit and notice of motion to require deposit of fines or posting of bond pending appeal ret. 8-2-74.
8-2-74	LOUIS OSTRER-Filed Deft's. reply affirmation in opposition to Govt's. motion dated 7-25-74.
8-8-74	LOUIS OSTRER-Filed Gov't reply affdvt Re: motionfor payment of fines.
9-10-74	LOUIS OSTRER-Filed Stipulation of Payment of Fine. The Deft. will pay $1,500.00 per month for 35 consecutive months with a final payment of $2,500.00 on the 36th month. Payment is to be by certified check or money order made payable to the Treasurer of the United States. Such payments are to satisfy criminal fine of $55,000.00 imposed on 4-12-73. Initial payment to be received on or before 9-5-74 and subsequent payments are due on the 5th day of each succeeding month. .....So Ordered.....Edelstein,Ch.J.
11-11-74	JOHN DIOGUARDI-Filed true copy of U.S. Supreme Court Mandate. The petition for a writ of certiorari is denied. (mailed notice)
11-11-74	Filed letter from the U.S. Court of appeals that the mandate issued on 3-12-74 should now be construed as applying to appellant Louis Ostrer.
11-11-74	LOUIS OSTRER-Filed true copy of U.S. Supreme Court Mandate. The petition for a writ of certiorari is denied.
11-19-74	LOUIS OSTRER-Filed transcript of record of proceedings dated 8-15-74.
12-11-74	LOUIS OSTRER-Filed deft's. notice of motion to admit to bail, ret. 12-16-74.
12-11-74	LOUIS OSTRER-Filed deft's. affidavit in support of notice of motion to admit to bail.
12-11-74	LOUIS OSTRER-Filed deft's. memorandum in support of motion to continue petitioner on bail or to admit him to bail.
12-11-74	LOUIS OSTRER-Filed deft's. notice of motion for new trial and for evidentiary hearing, ret. 12-16-74.

Cont'd. on Page #17

File 71C2558

DATE	PROCEEDINGS
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]

110 Rev. Civil Docket Continuation

ATE	PROCEEDINGS	Date Order or Judgment Note
-11-74	LOUIS OSTRER-Filed deft's. affidavit in support of motion for new trial (on 4th Amendment ground).	
-11-74	LOUIS OSTRER-Filed deft's. affidavit in support of request for evidentiary hearing & motion for new trial (Fourth and Sixth Amendment Grounds).	
-11-74	LOUIS OSTRER-Filed deft's. memorandum in support of request for evidentiary hearing on motion for new trial.	
-16-74	Deft's. Louis Ostrer motion to admit to bail - Denied. Motion to stay surrender of sentence Denied. Deft. ordered to surrender for service of sentence on Dec.17,1974 at 10:30 in Marshal's Office. Marshal's Office notified...Edelstein,Ch.J.	
-18-74	LOUIS OSTRER-Filed deft's. notice of appeal from the order denying bail,,dated Dec.16,1974, Mailed notice to Louis Ostrer, 427 West St.N.Y.C. 10014 and U.S. Attorney's Office.	
-18-74	LOUIS OSTRER-Filed OPINION #41601-Deft's. motion to admit to bail is denied. The motion for a new trial will be decidediin due course. SO ORDERED.....Edelstein,Ch.J. (mailed notice)	
-18-74	MORRIS WINTER-Filed Nolle Prosequi.....Edelstein,Ch.J.	
-26-74	LOUIS OSTRER-Filed affidavit of Julius November in support of deft's. motion for a new trial.	
-26-74	LOUIS OSTRER-Filed affidavit of Marjorie RICHARDSON in support of deft's. motion for a new trial.	
-26-74	LOUIS OSTRER-Filed affidavit of Maurice Edelbaum in support of deft's. motion for a new trial.	
-26-74	LOUIS OSTRER-Filed affidavit of Richard H. Wynn in support of deft's. motion for a new trial.	
-26-74	LOUIS OSTRER-Filed deft's. affidavit in support of his motion for a new trial.	
-26-74	LOUIS OSTRER-Filed affidavit of Clarence B. Jones in support of deft's. motion for a new trial.	
-26-74	LOUIS OSTRER-Filed Govt's. affidavit in opposition to deft's. motion for a new trial.	
-26-74	LOUIS OSTRER-Filed Govt's. memorandum of law in opposition to deft's. motion for a new trial.	
-31-74	LOUIS OSTRER-Filed affidavit of Harvey A. Silverglate in connection with deft's. pending motion for a new trial and for an evidentiary hearing.	
-31-74	LOUIS OSTRER-Filed deft's. reply memorandum on wiretap issue.	
-31-74	LOUIS OSTRER-Filed affidavit of Julius November in reply to Govt's. opposition.	
-6-75	LOUIS OSTRER-Filed affidavit of Maurice Edelbaum, re: telephone conversations with Mr. Moss & deft.	

DATE	PROCEEDINGS	Date Judgm
1-13-75	LOUIS OSTRER-Filed true copy of U.S.C.A. mandate. Deft's. motion dated 12-17-74 to continue bail pending determination by the U.S.District Court for the S.D.N.Y. for a motion for a new trial is granted. It is further ordered that bail will continue for 24 hours after a decision by the U.S. District Court on the motion for a new trial or until the next panel of this court is available to hear any subsequent bail application, whichever is the later of those two dates. (mm)	
1-24-75	LOUIS OSTRER-Filed Govt's. reply memorandum of law.	
1-24-75	LOUIS OSTRER-Filed Govt's. affidavit by John Fine.	
1-24-75	LOUIS OSTRER-Filed Govt's. supplemental affidavit by Harold F. McGuire, Jr.	
1-24-75	LOUIS OSTRER-Filed deft's. notice of motion for production of tapes, logs, memoranda and other documents relating to monitored conversations.	
1-24-75	LOUIS OSTRER-Filed affidavit of Alan M. Dershowitz in support of deft's. motion for production.	
1-24-75	LOUIS OSTRER-Filed deft's. memorandum of law in support of motion for production.	
1-24-75	LOUIS OSTRER-Filed affidavit of Seymour Greenfield in support of deft's. motion for production.	
1-24-75	LOUIS OSTRER-Filed affidavit of Julius November in support of deft's. motion for production.	
1-24-75	LOUIS OSTRER-Filed deft's. memorandum in rebuttal to Govt's. reply memorandum and supplemental affidavits.	
2-11-75	JOHN DICGUARDI-Filed deft's. affidavit & notice of motion for reduction of sentence, ret. 2-25-75.	
2-11-75	LOUIS OSTRER-Filed deft's. notice of motion for reduction of sentence.	
2-11-75	LOUIS OSTRER-Filed deft's. affidavit in support of motion for reduction of sentence.	
2-13-75	LOUIS OSTRER-Filed affidavit of Harvey A. Silverglate in support of deft's. motion for a new trial.	
2-18-75	LOUIS OSTRER-Filed deft's. supplementary memorandum in support of motions for an evidentiary hearing & production.	
2-18-75	LOUIS OSTRER-Filed deft's. affidavit in support of motions for production, a new trial & for an evidentiary hearing.	
2-24-75	Filed transcript of record of proceedings dated 12-16-74.	
2-28-75	Filed Govt's. Reply Memorandum of Law.	
3-7-75	LOUIS OSTRER-Filed deft's. affidavit in support of motion for a new trial.	
3-17-75	LOUIS OSTRER-Filed deft's. notice of motion for leave to file rebuttal memorandum.	
3-17-75	LOUIS OSTRER-Filed deft's. notice of motion for leave to filed affidavit of counsel	

Cont'd. on Page #19

DATE	PROCEEDINGS
3-17-75	LOUIS OSTRER-Filed affidavit of Harvey A. Silverglate.
3-17-75	LOUIS OSTRER-Filed deft's. memorandum of law in rebuttal to Govt's. reply memorandum.
3-17-75	LOUIS OSTRER-Filed certificate of service of motions by Harvey A. Silverglate, on 3-13-75.
3-21-75	LOUIS OSTRER-Filed deft's. motion for leave to file affidavit & memorandum.
3-21-75	LOUIS OSTRER-Filed affidavit of Harvey A. Silverglate, concerning wiretaps on deft's. telephone.
3-21-75	LOUIS OSTRER-Filed deft's. memorandum concerning 4th Amendment defects in wiretap application.
3-21-75.	LOUIS OSTRER-Filed certificate of service of affidavit & memorandum by Harvey A. Silverglate on 3-19-75.
4-11-75	LOUIS OSTRER-Filed Deft's. motion for leave to file motions.
4-11-75	LOUIS OSTRER-Filed Deft's. renewal of motion for production of tapes, logs, memoranda and other documents relating to monitored conversations.
4-11-75	LOUIS OSTRER-Filed deft's. motion for order respecting preservation of wiretap and eavesdrop tapes.
4-11-75	LOUIS OSTRER-Filed affidavit of Harvey A. Silverglate in support of deft's. motions
4-11-75	LOUIS OSTRER-Filed certificate of service of Harvey A. Silverglate, of the motions and affidavit on 4-9-75.
6-5-75	JOHN DIOGUARDI-Filed OPINION #42537 - Deft's. motion for reduction of sentence is denied.....Knapp,J. (mailed notice)
6-16-75	JOHN DIOGUARDI-Filed deft's. notice of appeal from the order of 6-5-75 denying Rule 35 relief. Mailed notice to: John Dioguardi, P.O. Box 1000, Lewisburg,Pa. and U.S. Attorney's Office.
7-24-75	Filed transcript of record of proceedings dated 5-14-75.
8-11-75	Filed Envelope containing orders of the Court. Ordered sealed by Judge Lasker and placed in vault in Room 602. (Filed in 70 Cr. 967)
10-8-75	LOUIS OSTRER-Filed OPINION #43223 - Oral ofder of this Court dated 3-20-73 is modified to permit issuance of a subpoena duces tecum to Flower-Fifth Avenue Hospital for certain records of Miss Genena Rush. The U.S. Attorney and counsel for deft. shall be permitted to listen to certain tapes now in possession of Asst. District Attorney, N.Y.County which include conversations between deft. and Maurice Edelbaum, Julius November, Henry Boitel and Richard Wynn.....Brieant,J (mailed notice)
10-21-75	JOHN DIOGUARDI-Filed CONSENT ORDER dismissing the appeal from the Order of Judge Knapp denying Rule 33 relief.....Knapp,J.

DATE	PROCEEDINGS
12-18-75	Filed one sealed carton contents ordered impounded, sealed and placed in vault in Rm. 602. Brieant, J.
12-19-75	Filed one sealed manila envelope containing hospital records ordered impounded, sealed and placed in custody of cashier. Brieant, J.
12-22-75	LOUIS OSTRER - Filed Order that the tapes directed by me to be placed in the safe of the Clerk of this court be delivered to A.U.S.A. Lawrence B. Pedowitz against his receipt therefor. Brieant J. Rec'd Lawrence B. Pedowitz 12-19-75.(mailed notice)
1-7-76	LOUIS OSTRER - Filed Gov'ts. Notice of Default
1-7-76	JOHN DIOGUARDI - Filed Notice of Motion for a new trial on the ground of newly discovered evidence. Ret. 1-19-76.
1-7-76	JOHN DIOGUARDI - Filed Memo. End. on motion dtd. 1-7-76. motion is respectfully referred to Judge Brieant Jr. with his consent. Edelstein Ch. J. (mailed notice)
3-1-76	JOHN DIOGURADO - Filed 2nd Memo. End. on motion dtd. 1-7-76, for a new trial. Motion denied..... Brieant J. (mailed notice)
03-11-76	LOUIS OSTRER, - Filed Gov'ts, Notice of Default.
3-15-76	LOUIS OSTRER-Filed manila envelope containing tapes ordered sealed, impounded and placed in cashier's office. Brieant, J.
3-18-76	LOUIS OSTRER - Filed Defts. Memorandum of Fact & Law in support of motion for a new trial.
3-31-76	LOUIS OSTRER - Filed Gov'ts. affdvt.in response to dfts. Post Hearing submission in support of his motion for a new trial.
3-31-76	LOUIS OSTRER Filed Gov'ts Memorandum in response to dfts Post Hearingg submission in support of his motion for a new trial.
4-1-76	LOUIS OSTRER - Filed Gov'ts, Affdvt. by John C.Fine.
4-5-76	LOUIS OSTRER - Filed Dfts. motion for enlargement of times which to file reply brief.
4-6-76	LOUIS OSTRER - Filed Memo. End. on motion for enlargement of time .Motion Granted. .....Brieant J. (mailed notice)
04-12-76	LOUIS OSTRER - Filed Dfts. Reply Memorandumt in support of his motion for a new trial.
04-21-76	LOUIS OSTRER - Filed Gov'ts Notice of Default.
05-27-76	LOUIS OSTRER - Filed Gov'ts Notice of Default.
6-3-76	LOUIS OSTRER - Filed letter from Attys. Silverglat Shapiro & Gertner,Boston,Mass. dtd. 1/8/76 Re: wiretap tapes ordered to be copied.
6-3-76	JOHN DIOGUARDI & LOUIS OSTRER - Filed Transcript of proceeding dtd. 2/9/76.

DATE	PROCEEDINGS
6-4-76	LOUIS OSTRER - Filed Opinion#44530. Findings of Fact & Conclusions of Law following hearing on motion pur. to Rule 33FRCr.P. Dfts. Motion for a New Trial Denied, as indicated.....Brieant J. (mailed notice)
6-7-76	LOUIS OSTRER - Filed Affdvt. by John Fine atty. of Inspector Gen. U.S.Dept. of State
6-7-76	LOUIS OSTRER - Filed Supplemental Affdvt. by Harold F. McGuire Jr. in response to dfts. reply memorandum & affdvt. of Julius Novenber filed 12/31/74.
6-7-76	LOUIS OSTRER - Filed Gov'ts. Reply Memorandum of Law.
6-7-76	LOUIS OSTRER - Filed letter to Judge Brieant from U.S.Dept. of Justice, U.S Atty. Office,SDNY dtd. 4-19-76/
6-7-76	LOUIS OSTRER - Filed Affdvt. of Louis Ostrer in supoort of motion for production of tapes,Logs,Memoranda & Other Documents relating to monitored conversation & the motion for a new trial & for Evidentiary Hearing.
6-21-76	LOUIS OSTRER - Filed Dfts. Notice of Appeal from order denying a New Trial dtd. 6-4-76.(mailed notice)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	
Plaintiff	71 Cr. 558 DNE
against	NOTICE OF MOTION FOR NEW TRIAL AND FOR EVIDENTIARY HEARING
LOUIS OSTRER,	
Defendant.	

SIR:

PLEASE TAKE NOTICE that on or after December 16, 1974, at a time designated by the Honorable David N. Edelstein, Chief Judge of the United States District Court for the Southern District of New York, at the United States Courthouse, Foley Square, New York, New York, the undersigned counsel will move the Court, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, to grant the Defendant herein a new trial.

The grounds for said motion, more fully set forth in the appended affidavits of Alan Dershowitz, Esquire, and to be more fully set forth in additional affidavits which are currently in preparation and which will be submitted to the Court within one week of December 16, 1974, include the following:

1. Subsequent to the affirmance of the Defendant's conviction by the United States Court of appeals for the Second Circuit on January 4, 1974, newly-retained counsel for Defendant Ostrer

discovered an apparent error in the trial transcript of evidence, which error was probably responsible for the District Court, the Court of Appeals, and the prosecution and the defense attorneys at trial misunderstanding a vital point, which point, if properly understood, would have resulted in the disqualification upon jury selection voir dire of a juror who ultimately sat on the case, or, had the point been understood after the trial and conviction, would probably have resulted in this Court's granting Defendant's earlier-filed motion for a new trial on the basis of violation of his Fifth Amendment Due Process rights.

2. Subsequent to the conviction of the Defendant, and subsequent to all appeals to date in this case, new counsel for the Defendant discovered evidence which reasonably leads to the conclusion that the Government was privy, prior to and during trial, confidential and privileged communications between the Defendant and his attorneys, which communications were obtained from New York State authorities, who in turn obtained them by means of wiretapping and electronic surveillance of the Defendant's premises, all in violation of the Defendant's Fourth and Sixth Amendment rights.

The granting of the motion for a new trial is in the interests of justice.

The Defendant will further move the Court to convene an evidentiary hearing on the motion for a new trial.

Yours, etc.,

Alan Dershowitz
41 Concord Avenue
Cambridge, Massachusetts 02138
Office tel. (617) 495-4617

Appended:

Affidavit of Alan Dershowitz (in support of ground #1)

Affidavit of Alan Dershowitz (in support of ground #2)

SAS:wp
71-1572

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA :

:

- v - : AFFIDAVIT

:

LOUIS OSTRER, : 71 Cr. 558 (DNE)

:

Defendant. :

- -x

HAROLD F. MC GUIRE, Jr., being duly sworn, deposes and says:

1. I am an attorney and a member of the firm of Gilbert, Segall and Young in New York City. During 1972 and 1973 I was an Assistant United States Attorney in the Southern District of New York and was in charge of the prosecution of Louis Ostrer which resulted in his conviction in this case. I make this affidavit in opposition to Ostrer's latest motion for a new trial, based on allegations that the government was privy to electronically-intercepted conversations among Ostrer, his lawyers and his witnesses prior to and during the trial. I deny those allegations categorically.

2. Prior to the conclusion of Ostrer's trial, I never listened to a tape recording of Ostrer's voice, or the voices of any of the actual or potential witnesses at his trial; nor did I see transcripts of the results of any electronic surveillance of Ostrer, his telephones or his business premises; nor did I receive any information identified as having come from electronic surveillance involving Ostrer or any of his associates. [As set forth below, however, I was informed

SAS:ik
71-1572

[redacted] at it was possible that Ostrer or his associates might be tampering with a potential government witness named Aubrey Moss.]

3. On April 18, 1973, nearly three months after Ostrer's trial was concluded, I was informed for the first time in a conversation with then Assistant District Attorney John Fine of the fact that a court-ordered electronic surveillance involving Ostrer had occurred. Prior to that conversation, I was unaware of such surveillance, although I knew that the District Attorney's Office had had a continuing interest in Ostrer and his activities.

4. Sometime in December, 1972, I met Assistant District Attorney Fine for the first and only time prior to Ostrer's trial. The meeting occurred at Mr. Fine's request, or more precisely at the request of his chief, Alfred Scotti, who relayed it to my superior, Chief Assistant United States Attorney Silvio Mollo. I met Mr. Fine in his office for perhaps a half an hour. Mr. Fine told me, in substance, that in connection with an investigation being conducted by his office information had come to him to the effect that Ostrer and/or Julius November, an attorney associated with Ostrer, might be attempting to tamper with a prospective government witness named Aubrey Moss. Mr. Fine was extremely guarded in the manner in which he gave me this information, telling me that he was not authorized to reveal the nature or substance of his investigation. He told me that Ostrer "had something" on Moss and might be using it to blackmail him, and that the District Attorney's office wished to

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71-1572

head-off any possible obstruction or miscarriage of justice. I thanked Mr. Fine for the information and told him -- truthfully -- that I had about decided, based on a prior interview of Moss in my office on November 21, 1972, not to use him as a witness in the prosecution of Ostrer in any event. I then obtained from Mr. Fine some background information about Ostrer's prior prosecution in the state courts, which had resulted in a guilty plea to grand larceny of some hundreds of thousands of dollars from an insurance company and on account of which he had received a suspended sentence from Mr.Justice Riccobono. I requested, and later received, from Mr. Fine copies of Ostrer's judgment of conviction and transcripts of certain court proceedings in connection with that prosecution, for use in cross-examination in the event Ostrer should take the stand at his trial.

5. To summarize: prior to Ostrer's trial I did not know of any electronic surveillance involving Ostrer, much less was I privy to it. I had received some information from the District Attorney's Office about a possible obstruction of justice involving a potential government witness, but I was not informed about the sources of the District Attorney's information. This information was transmitted to me because of the District Attorney's concern that a crime was in progress or about to be committed, and not because I solicited it. I never called Aubrey Moss as a witness at the trial, nor did Ostrer, nor did I receive any other non-public information about Ostrer

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SAS:fk di cly or indirectly from the District Attorney's office.

71-1572

HAROLD F. MC GUIRE, JR.

Sworn to before me this

day of December, 1974

UNITED STATES DISTRICT COUR
SOUTHERN DISTRICT OF NEW YORK 29

UNITED STATES OF AMERICA :

-v-

LOUIS OSTRER

Defendant :

AFFIDAVIT
71 Cr. 558 (DNE)

JOHN FINE, being duly sworn deposes and says:

1. I am an attorney and am attached to the Office of the Inspector General, United States Department of State. During 1972 and 1973 I was an Assistant District Attorney in New York County and was in charge of an investigation whose targets included Louis Ostrer and Julius November, an attorney associated with him in certain business ventures.

2. During the course of my investigation both Ostrer and November were named targets of court authorized electronic surveillance. This surveillance was in no way initiated at the behest of federal authorities nor for the purpose of assisting them in any manner. Nor was it renewed or continued for such purposes.

3. During the course of this electronic surveillance, conversations between Ostrer and November were intercepted which led me and my superiors to seriously fear that Ostrer and November were attempting to obstruct justice in Ostrer's forthcoming federal trial by influencing the testimony of a prospective federal government witness named Aubrey Moss. Specifically, Ostrer and November had learned that Moss had been having an illicit relationship with a certain woman and were conspiring to use this knowledge to affect Moss' testimony as a potential witness against their interests.

After intensive discussions in our office, we concluded that it was necessary to disclose to the federal authorities our fear that an obstruction of justice might be underway. Because in our judgment the interceptions did not indicate the existence of an attorney client relationship between Ostrer and November with respect to the federal trial and the contents of the intercepted conversations did not come within any attorney client privilege, we did not believe that such a disclose would in anyway taint Ostrer's federal trial. Nevertheless we decided to communicate to the United States Attorney's Office, the minimum amount of information necessary to alert it to the danger of obstruction of justice.

4. Accordingly I met sometime during late 1972 with Harold F. McGuire Jr., the federal prosecutor in the Ostrer case. I did not disclose to him the existence of our electronic surveillance but only told him that information had come to the District Attorney's Office which indicated that Ostrer and November might be attempting to influence the testimony of Moss. No other information derived from our electronic surveillance was disclosed to him or any other person associated with the federal trial prior to Ostrer's conviction.

5. Mr. McGuire then told me that he had already decided not to call Moss as a witness based on his having already interviewed him and that my disclosure confirmed his witness of using Moss. In order not to risk exposing the District Attorney's investigation, it was agreed that Mr. McGuire would have Moss kept under subpoena throughout the period of Ostrer's trial.

JOHN TINE

SWORN to before me this

8th day of January 1975

Mary F. Missakian
Notary Public
Washington, D. C.

My Commission Expires April 30, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
-v-	:	SUPPLEMENTAL AFFIDAVIT
LOUIS OSTRER,	:	71 Cr. 558 (DNE)
Defendant.	:	

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

HAROLD F. McGUIRE, JR., being duly sworn, deposes and says:

1. I make this affidavit in response to Ostrer's reply memorandum and the affidavit of Julius November filed on December 31, 1974 in connection with Ostrer's motion for a new trial.

2. In his reply memorandum Ostrer argues (p. 3) that my prior affidavit is ambiguous in that I may have received additional information about intercepted conversations from the District Attorney's Office (a) in telephone conversations with or letters from Assistant District Attorney John Fine or (b) indirectly through my superior Mr. Mollo. My prior affidavit clearly states in paragraph 5 that the only information which I received, directly or indirectly, from the District Attorney's Office was that a possible obstruction of justice might be underway with respect to a prospective Government witness; but if this is not clear enough, let me reaffirm (a) that I received no information from Mr. Fine prior to Ostrer's

conviction other than as reported in my original affidavit, and (b) that I never received any information concerning this case from Mr. Mollo except the message to contact the District Attorney's Office. I had no correspondence with Mr. Fine, and whatever telephone conversations I might have had with him, to the best of my recollection, related only to setting up a meeting between us. In any event, they did not involve my receipt of any information other than that which I have previously outlined.

3. Prior to my having any contact with the New York County District Attorney's Office, I had reached a decision not to include Aubrey Moss on the list of witnesses I intended to call at the trial of this action. However, Moss was one of a number of witnesses as to whom I caused trial subpoenas to be issued so that they would be available in case my trial plans changed. If anything, my conference with Assistant District Attorney Fine reinforced my determination not to call Moss, but it did not cause that determination and it was certainly not a matter of great significance one way or the other in my planning of trial strategy.

4. Prior to and during the course of Ostrer's trial, I took no steps to launch an investigation of any possible obstruction of justice with respect to Moss.

HAROLD F. McGUIRE, JR.

Sworn to before me this
8th day of January, 1975.

Notary Public

IRENE MEYER
Notary Public, State of New York
No. 03-4508960
Qualified in Bronx County
Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	
-v-	71 Cr. 558 (DNE)
LOUIS OSTRER,	
Defendant	

NOTICE OF MOTION FOR PRODUCTION OF TAPES, LOGS, MEMORANDA AND OTHER DOCUMENTS RELATING TO MONITORED CONVERSATIONS

SIR:

PLEASE TAKE NOTICE that on or after January , 1975, at a time designated by the Honorable David N. Edelstein, Chief Judge of the United States District Court for the Southern District of New York, at the United States Court House, Foley Square, New York, New York, the undersigned counsel will move the Court to order the production of all tapes, logs, memoranda and other documents relating to the monitored conversations between Louis Ostrer and any of his attorneys, including but not limited to Maurice Edelbaum, Julius November, Henry Boitel, and Richard Wynn.

The ground for this motion, more fully explained in the appended affidavit of Alan Dershowitz, Esquire, and in Defendant's Memoranda, is the Defendant's contention that direct evidence of the contents of various monitored conversations is essential to the correct

resolution of a series of disputed factual issues critical to the Defendant's pending Motion for a New Trial.

Yours, etc.,

Alan Dershowitz
41 Concord Avenue
Cambridge, Massachusetts 02138
Off. tel. (617) 495-4617

Of counsel:

Harvey A. Silverglate
Silverglate, Shapiro & Gertner
217 Lewis Wharf
Boston, Massachusetts 02138
(617) 723-2624

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
vs.	:	71 Cr. 558
LOUIS OSTRER,	:	
Defendant.	:	

Before;

HON. CHARLES L. BRIEANT, JR.,
District Judge.

New York, September 5, 1975;
11.45 o'clock a.m.
(Room 1305)

APPEARANCES:

PAUL J. CURRAN, Esq.,
United States Attorney for the
Southern District of New York;
BY: LAWRENCE PEDOWITZ, Esq.,
Assistant United States Attorney.

ALAN DERSHOWITZ, Esq.,
HARVEY SILVERGLATE, Esq.,
Attorneys for the Defendant.

(In open court.)

MR. PEDOWITZ: Ready for the Government, your Honor.

MR. DERSHOWITZ: Ready for the defendant, your Honor.

THE COURT: Excuse me, did you say defendants?

MR. DERSHOWITZ: The defendant, Mr. Ostrer.

THE COURT: You are Mr. Silverglate?

MR. DERSHOWITZ: My name is Dershowitz.

I'm a member of the Massachusetts bar and the Court of Appeals of this Circuit. I was admitted by Judge Edelstein pro hac for the purposes of this case.

Mr. Ostrer is in court together with his wife.

THE COURT: He may sit with you if he would like to.

MR. DERSHOWING: Your Honor, the reason we asked for this conference is that the matters before this Court are rather lengthy. They involve 50 documents submitted to the Court seriatim over a nine-month period, as matters came to our attention and as matters progressed in both the State and Federal Court.

THE COURT: Perhaps you should state for the record precisely what you consider to be presently before this Court for determination and your view as to the best

procedural approach to it. As soon as you finish it I will permit Mr. Pedowitz to interrupt you to say whether he concurs or not.

MR. DERSHOWITZ: By all means. What is before this Court currently are two motions. The relief sought in both motions is a new trial. But they are not motions for a new trial in the sense of motions based simply on newly discovered evidence in the normal course of events.

In the wiretap motion we are dealing with evidence of Government illegality, violation of Sixth Amendment and Fourth Amendment rights which we claim materially affected this trial.

Shall I at this point go into a very brief chronology or would you prefer an overview and a recommendation?

THE COURT: I would like to have you tell me what you claim happened, but first you say you have a motion directed at improper wiretap usage. What is the second branch of your motion?

MR. DERSHOWITZ: The second branch of the motion is a motion for a new trial based on the fact, discovered while the case was pending, on a writ of certiorari, involving an error which permeated the entire appellate process. Whether one calls it a grammatical

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error, a transcription error, or simply an error perception is not important. What happened is all the lower courts in this case, the Court of Appeals and the District Court, premised their decision on an assumption that Mrs. Rush, a juror who sat on Mr. Ostrer's trial and who wrote a letter following the trial indicating she heard things and saw things that were not a matter of record, they all based their assumption that Mrs. Rush was working, fully employed for four years, not a committed patient in a mental hospital.

THE COURT: You mean she had delusional things she heard?

MR. DERSHOWITZ: She said she heard things nobody else heard. That was clear.

THE COURT: What kind of things?

MR. DERSHOWITZ: I will read you briefly from --

THE COURT: It isn't necessary to read.

MR. DERSHOWITZ: She said that I hear things no one else heard about you. I saw your wife and she is a good woman.

Now, the wife never was in the courtroom, never appeared at the trial. A whole variety of facts.

Seven psychiatrists read the letter and diagnosed it as clearly hallucinatory, clearly manifesting a mental illness at the time, fitting into a diagnosis of

mental illness.

The District Court did not hold a hearing, but on the basis simply of the allegations and psychiatric testimony concluded that since she was employed and since there was no evidence that she was ever in a mental hospital, the threshold for an evidentiary hearing was not reached.

The Court of Appeals affirmed on the same grounds, saying she has held steady employment over the past four years as a nurse's aid at Flower Fifth Avenue Hospital, and that no evidence was offered of any history of mental instability.

The cases cited all stand for the proposition that if you can show that a patient was committed to a mental hospital or adjudicated insane at the time of the trial, of course a new trial is required. But if you are simply making allegations without any objective support in the record, known evidence is required.

While the case was pending on certiorari two new counsel were introduced into the case, both who had familiarity with psychiatric jargon and practice. Immediately upon reading the record in the case something popped out. We saw that she had said, when she was asked what her job was, that she was -- asked where she worked or what she did, that she was a patient-attendant.

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It occurred to us immediately, knowing the psychiatric jargon, what patien t-attendant means. It is a commonly used hyphenaced phrase meaning a patient in a mental hospital who also does part-time work as an attendant.

Nobody spotted that. Nobody realized that. In fact, the Court of Appeals, with no further evidence other than the words patient-attendant, translated that into nurse's aid and made that a basis of the Court of Appeals' opinion.

We brought that fact, which hit us like a bomb when we discovered it, immediately consulted various psychiatrists who said, you are right, patient-attendant means that. We immediately made contact and found out, without mentioning any name and without violating the Court order, that Flower Fifth Avenue Hospital has patient-attendants.

THE COURT: Did she say she was an employee of Flower Fifth Avenue Hospital?

MR. DERSHOWITZ: She said she worked there at one point for one year and at another point for four years. The reasonable reading is that she had been there four years, one year as a patient-attendant and three years in who knows what capacity.

It has a psychiatric ward patient-attendant program. We have been unwilling, I can represent to this

rds [7]

Court, to check any further into this at this point because of the pending order of Judge Edelstein that no further inquiry should be made into the particular juror's status.

We can make those representiations on the record in this case. It seems, therefore, that the entire assumption underlying both the District Court and the Court of Appeals' opinion is at least substantially undercut. We brought this fact to the attention immediately of the Solicitor General's office and we had a conference with the Solicitor General's office, and the Solicitor General repeated to us orally and then placed in writing on the brief the Government's view at that time that this issue was not appropriately before the United States Supreme Court at the time, since no evidentiary background was made and it was simply being done at that time on the basis of an ex parte representation that this issue, if it requires relief at all, requires it in the Federal District Court. That was the basis on which we filed our new trial motion immediately after the United States Supreme Court denied certiorari.

So that is one issue in this case.

While this was going on and while we were preparing our new trial motion I learned for the first time the Government, the State Government of New York, had

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planted a wiretap in the offices of Louis Ostrer which was co-terminus with his preparatio n for trial. The dates are exact. He was indicted in May 1971. The wiretap was installed October 25th, 1972. He went to trial January 5, 1973, just several months thereafter. He conferred in his office with his attorneys, Maurice Edelbaum, Julius November, Richard Wynn, Clarence Jones, and discussed extensively the legal strategy in the case.

The Government concedes that there are 70 hours of tapes which include conversations with his attorneys.

THE COURT: This was a State tap?

MR. DERSHOWITZ: State tap.

THE COURT: Was this a Joint Task Force case?

MR. DERSHOWITZ: Not that we know. No information indicating any Federal involvement in the indicating any Federal involvement in the initial tap itself. Although immediately upon learning this information and hearing the wiretap the State District Attorney had his superior call the superior of the lawyer in Federal Court, Mr. McGuire, and a meeting was arranged.

At that meeting it is conceded by the Government that portions of conversations between Mr. Ostrer and his attorney were divulged to the Federal prosecutor. It is also conceded the Federal prosecutor was not told,

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at least it is argued by the Government that the Federal prosecutor was not told the information that was given to him was the result of the wiretap. He was told that the investigation was a discreet one. He was told --

THE COURT: "He" being the actual Assistant who was trying the case?

MR. DERSHOWITZ: Yes, Mr. McGuire.

THE COURT: Was given information which, according to your view of this matter, came from a State wiretap to the superior of the Assistant U. S. Attorney and from that superior to the actual trial man?

MR. DERSHOWITZ: Yes. Only one correction. That is not in our view of the case. That is on the agreed upon view of this case.

THE COURT: The prosecutor did in fact -- the actual trial lawyer for the Government did in fact receive material information from a wiretap maintained by the State of New York?

MR. DERSHOWITZ: I am not sure that the Government would stipulate to the words "material information". They did concede the information was given to the actual trial prosecutor. They do concede that that information came from the wiretap. They dispute that the U. S. prosecutor was aware that the information came from the

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wiretap, and we vigorously dispute that claim. We argue that a sensible, sensitive Assistant United States Attorney was called and told, "By the way, you ought to know that the defendant in this case has been speaking with his lawyer to a certain witness and they are thinking of an obstruction of justice and you had better not mention anything about that. This is a discreet investigation."

When the Assistant District Attorney signs the affidavit that he was careful not to tell him the source of the investigation and the United States Attorney agrees, we would like to be able to develop at an evidentiary hearing precisely what was the state of mind of that U. S. Attorney when he failed to comply with his ethical obligation under the Canon of Ethics and the ABA Rules of Professional Responsibility, and make inquiry if he thinks an illegality has occurred.

THE COURT: Isn't this to find what should have been done and not what the subjective attitude of the man who was doing it was?

MR. DERSHOWITZ: By all means. Our primary --

THE COURT: It is an objective test, isn't it?

MR. DERSHOWITZ: It is an objective test as to what should have been done, of course. But it is a ratchet. It is an objective-subjective test.

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THE COURT: If this information was received from a reliable informant rather than a wiretap, that conduct would have been perfectly appropriate?

MR. DERSHOWITZ: It couldn't. By its very nature lawyer-client information can't come from a reliable informant.

THE COURT: Not necessarily. There may have been somebody else present at the conversation.

MR. DERSHOWITZ: Then it would break the privilege as the Gardener case holds.

THE COURT: One of the principals might have told somebody with whom he occupied a privileged relationship. Any number of potential possibilities.

Let me leave that and proceed further for the moment. I think you have tendered to me what the issues are, unless there are more.

MR. DERSHOWITZ: There is more to it. It turns out later that the State Court held that not only was there a State wiretap which violated -- there was a State wiretap which we maintain violated the Sixth Amendment rights of this defendant, but the State Court also held that it violated the Fourth Amendment because it was an unlawful wiretap as well. That was decided upon motion by the State Government of New York dismissing --

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THE COURT: Let's stick with what we have here today. What is your view as to the procedural steps that should be taken and in what order should we go forward?

MR. DERSHOWITZ: Our position is as follows:

This Court should ask the United States Government whether or not it agrees with the representations I have made as to the truth that there was a State wiretap and that it covered lawyer-client conversations; that information from that wiretap was transmitted to the Assistant United States Attorney handling that case and that the Assistant United States Attorney in that case allowed that information to influence his decision in calling a witness in this case.

On the record it states that it refinforced his decision not to call a given witness.

If the Government stipulates all of those facts are correct, we feel proper disposition of this case is for a new trial to be granted right at this point under the principles of Black and O'Brien.

The United States Supreme Court in the Black and O'Brien, in both cases, there was overhearing by wiretap. In one case the Supreme Court reversed, the overhearing involved the voice of a lawyer, and they turned off -- the voice of the client. They turned off the tape --

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THE COURT: Let's stick with what is presently before me.

MR. DERSHOWITZ: The United States Supreme Court held in that case, over the objection of the Government --

THE COURT: Please. You say if all these matters are conceded we don't need an evidentiary hearing on the wiretap branch of the motion?

MR. DERSHOWITZ: Yes, your Honor.

THE COURT: Assuming they are not --

MR. DERSHOWITZ: Then, of course, a hearing would be required. There is no case we have found in the Federal Courts where a serious allegation has been made of a wiretap --

THE COURT: Please. I just want to get your position. I would like to save time.

In such a hearing your view of the matter is that the testimony of this particular Assistant who tried this case would be taken on these matters

MR. DERSHOWITZ: Among others. The other thing that would be absolutely crucial is this:

The Government takes the position that the conversation between Mr. November, who is an attorney, and Mr. Ostrer, was not privileged. They argue that it

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involved discussions of obstruction of justice, which were crimes.

Now, they have stated in affidavit form, Mr. McGuire quoting the person who actually hear the tape recording, says that that conversation was not 1 awyer-client privilege.

THE COURT: Are the tapes in existence?

MR. DERSHOWITZ: They are. We have made a request as recently as 15 minutes ago of United States Attorney asking him to produce those tapes. We made that request after hearing your Honor say it would be inconceivable for a lawyer to try a case without hearing the tapes. We asked him at that point, hoping it would affect his decision. He said no.

We certainly think that this Court could not conclude with the Government's characterization that it was beyond the lawyer-client privilege without hearing the best evidence avaiable.

THE COURT: I want to come right to the point. I want to get your position on behalf of your client as to hetsteps that that are to be taken. This is a substantial matter which has generated a file of about five inches which is presently on my desk. I want to start on it step by step. I am anxious to find out what you want to do.

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I am going to ask you to spare me any unrelated rhetoric. Just tell me that we want an evidentiary hearing, we want Mr. McGuire to testify, Julius November to testify, and we want the Court to hear the tapes, if that is your position.

MR. DERSHOWITZ: We think our primary position is that on the basis of what the Government has already conceded in this case, a new trial should be granted.

THE COURT: At that new trial, or perhaps you could clarify this one step further for me and then I will ask the Government to respond. My understanding is it is your position that Mr. McGuire made a technical decision based on this material he obtained?

MR. DERSHOWITZ: Three positions on that. The record evidence in this case establishes that he admits that he was reinforced in a decision.

THE COURT: What was the decision?

MR. DERSHOWITZ: The decision as to whether or not to call a critical witness named Aubry Moss.

THE COURT: Did he call him?

MR. DERSHOWITZ: No. That was a critical defense strategy in the case.

THE COURT: In the new trial did he call Moss or not?

MR. DERSHOWITZ: A very serious question in

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this case, as it was in Black and O'Brien, as there is in almost every lawyer-client case, as to whether there can be a new trial in this case, that is a matter for another day. We asked in this case for a vacation of the judgment of conviction. At that point a motion would be put on, we would have conferences with the Government and see whether or not a new trial is feasible.

That was the position taken by the Government in Black and O'Brien. You couldn't grant a motion for a new trial because no new trial would be possible because the conviction is so tainted. The Courts have held that is a matter for another day.

The function of the primary court is to determine whether this conviction is voided, and then the issue arises whether a new trial is possible. It is possible that a new trial could be had here and the Government would have to call Aubry Moss as a witness. That is one possibility.

THE COURT: They can call him and ask him his name and address and stop.

MR. DERSHOWITZ: No. There are several differences. If one wants to project as to what might happen in a new trial --

THE COURT: I don't right now, but I think I

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understand enough of your position. I will come back to you in a moment.

What I want to do today is to get a feel for what is before me for decision and how to best go about the fact-finding or issue-resolving or law-questioning determining process.

MR. DERSHOWITZ: I think our position on that is very clear, that we think a new trial should be granted, that conviction should be vacated at this point. We think we should sit down with the Government.

There are various ways of curing this error, such as, allowing us to call Mr. Moss as an adverse witness. It might be the new trial would be a jury-waived trial, as Mr. Ostrer wanted from the beginning. The issue tried in front of a judge would be very different strategically than it would be if it were tried before a jury.

The Government has stipulated and conceded enough facts to warrant the dismissal of a conviction in this case. If that is not so, clearly an evidentiary hearing would be required at which we would have an opportunity previous to that to question Mr. Fein, people who overheard the wiretaps, to question Mr. McGuire, to question other Assistant United States Attorneys and to call whatever lawyers conferred with him, although that might be

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unnecessary in light of the best evidence, the tapes themselves.

On the jury issue our position is this:

If the Government is willing to stipulate that we can be allowed to check to see whether Genena Rush was an inmate of a mental hospital, we would be prepared to undertake that investigation and report to this Court. I think the Government has already conceded in its previous briefs in this case that if Miss Rush was a mental patient during the time this trial went on, then, of course, a new trial would be required. The remedy there would be simple: a new trial.

THE COURT: Let's hear from Mr. Pedowitz and then I will come back to you.

MR. PEDOWITZ: Your Honor, a very capsulized version of our position on this would be, one, we would oppose the granting of a new trial without an evidentiary hearing, as Mr. Dershowitz requested as his first alterantive.

THE COURT: What issues of fact do you consider would be the disputed issues which must be resolved at such a hearing?

MR. PEDOWITZ: I don't think we should have an evidentiary hearing. I think we can decide this issue on the papers. I was a little ambiguous in my original

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statement. My reasons for that view are as follows --

THE COURT: As I gather, each of you think that.

MR. PEDOWITZ: The first issue, as far as we are concerned, and the most important one as we view it, is the wiretap issue. The State has conceded, and we do not wish to rel itigate this issue, that the wiretap of Mr. Ostrer and certain individuals was unlawful under State law. What we do contest very vigorously is that Mr. Ostrer has suffered any Fourth Amendment or Sixth Amendment violations as a result of what the State did in his Federal trial.

The issue, as we see it, the most important issue, is what was learned by the Federal Government as a result of the State wiretap. Mr. McGuire's affidavit and Mr. Fein's -- I should say Mr. McGuire's affidavits because there are two, and Mr. Fein's affidavit, make very clear precisely what Mr. McGuire, who was the Federal prosecutor, learned as a result of his meeting with Mr. Fein, who was the State DA.

THE COURT: Stop right there.

I would like you to answer me, Mr. Dershowitz, very briefly if you can, yes or no, are you willing that the Court accept these two affidavits which have just been mentioned as truthful?

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MR. DERSHOWITZ: Absolutely not, your Honor. No.

THE COURT: You see, I can't find facts or determine credibility on affidavits unless the parties to the litigation agree that the affidavits may be considered by the Court to be truthful.

MR. PEDOWITZ: We believe there have been numerous cases in which new trial motions have been decided on the basis of affidavits; that Mr. Dershowitz is speculating entirely and is raising no substantial issue of fact concerning the truthfulness of those affidavits. He claims they are untruthful, but we do not believe he has any knowledge that would point to their untruthfulness.

The assertion in the affidavit by M.r Fein and Mr. McGuire is that there was a meeting; that the meeting occurred prior to the trial of Mr. Ostrer; that at that meeting Mr. Fein told Mr. McGuire that he believed that there was some tampering going on with a witness or potential witness named Aubry Moss.

Mr. McGuire has stated unequivocally in his affdavit, in his first affidavit that he had about decided not to call Aubry Moss. In his second affidavit he clarifies that, what this term "about" means. He said he had decided not to call him as a witness but had decided

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to subpoena him for purposes of trial in case his strategy might change.

Well, there was no change in strategy. He had decided not to call Moss. He did not call Moss.

We believe Mr. Ostrer can show no prejudice as a result of this meeting with Mr. McGuire and Mr. Fine.

In the absence of prejudice there is no Fourth Amendment violation and no Sixth Amendment violation.

THE COURT: To decide this issue the Court first has to find facts and the Court then has to reach the question of law. We cannot decide facts which are in good faith controverted in the affidavits. By the same token, an attorney who refuses to let the Court go forward on the basis of affidavits has, it seems to me, a duty to tell us why, what is there that is wrong with these affidavits. If there is a good faith showing that they are such that they should be subject to reasonable cross-examination, then I would have an evidentiary hearing. I would make it very short. If you want to bring the deponent in and have him testify that the affidavit is his direct testimony and be subject to cross-examination, I might find that satisfactory. But I cannot decide a fact issue on affidavits, even if they are signed by members of the bar.

MR. PEDOWITZ: I think the premise which you

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raise that there must be a good faith attack on the affidavit is a very valid one. We don't think there is one.

MR. DERSHOWITZ: We have spelled out our attack on the affidavit in some 40 pages in a memorandum and counter affidavits.

THE COURT: Tell me ina couple of sentences.

MR. DERSHOWITZ: It is this: We think we can develop on cross-exmination of Mr. McGuire that he surely suspected and probably knew that the information that was being disclosed to him was information obtained from a wiretap, No. 1.

No. 2, we would like to find out precisely what the state of mind of Mr. McGuire was before he met Mr. Fein and after he met Mr. Fein, how tentative was the decision to call Mr. Moss and not to call him. What precisely did he learn from the U. S. Attorney. What was the nature of the "background" material that was given to him. There are a variety of conclusions in the affidavit which we simply do not accept. All of us are astute enough cross-examiners to know that when you have a one-sentence conclusion of mixed fact and law --

THE COURT: Don't belabor that. Before we get too far with this topic, let me make a tentative observation. I don't visualize how the significance or

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the outcome of this episode or the effect of this episode would be altered materially by the subjective personal reaction of the actual man who happened yo be trying the case. Implicit in your argument is if the Government could surveil completely all the attorney-client discussion in some trial, and do it-- let's just say the Government could do it. Then if it could be shown on the hearing that the prosecutor listened to it and disregarded the entire matter as being nonsese on the theory that the State people are always suspecting witness tampering and had no part in his subjective reaction, just brushed it aside, that then that conduct would have no effect on the verdict. That seems to me initially to be somewhat unreasonable.

I think we ought to give consideration to the thought of having an adversary proceeding in so far as the facts set forth in the affidavit are concerned.

What else, Mr. Pedowitz, do you have in mind as proper here from a procedural point of view?

MR.PEDOWITZ: Well, your Honor, I would still adhere to my view that a hearing is unnecessary. I know your Honor will have an opportunity to look at the papers. I don't think there is in fact any conclusion in the affidavit which is not supported by adequate background in the affidavits. If Mr. Dershowitz wanted any clarifica-

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tion on any particular point, we could certainly supply that to him through an additional affidavit of Mr. McGuire.

MR. DERSHOWITZ: With all due respect, the assumption underlying Mr. Pedowitz' argument is that U. S. Attorneys always tell the truth.

THE COURT: He hasn't really said that and I think it is an inappropriate thought to inject into what we are doing today. I personally agree that the way to adjudicate controverted facts is by confrontation and cross-examination. No matter who makes the affidavit, whether it is a District Judge, a United States Attorney, all of whom I respect as men of intelligence and integrity, or whoever it is.

On the other hand, the Court doesn't try bootless issues. If the issue is irrelevant as a matter of law, as the subjective attitude of Mr. McGuire might well be, or if it is an issue as to which there cannot really be a reasonable dispute, then you ought not to inflict this on him.

MR. DERSHOWITZ: By all means, your Honor.

THE COURT: Let us move along here, if you don't mind.

Please continue, Mr. Pedowitz.

MR. PEDOWITZ: Addressing myself once again

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to the procedural issues, and this I think would necessarily follow next in the discussion ofthe wiretap issue, if there was to indeed be a hearing on the question of the legality of the tap and what was learned through the conversations of Mr. Fein and Mr. McGuire, then it most certainly seems to me it is entirely unnecessary to have the tapes subpoenaed from the State. The tapes are very lengthy, and I don't want to inject the thought that the Court should be contrainted to deny a person the right to a proper hearing simply because it may take a long time to decide the issue. It certainly does not seem to me to be relevant at all to what the State knew as a result of these conversations.

The only issue in this case is what the Federal prosecutor learned as a result of this meeting.

THE COURT: I think that creates a problem because the trier of the facts might infer that a State official who came down to see the United States Attorney to tell him about the situation would convey a full and fair report of what he came down to tell. I think at least some part of the tapes must be heard in order to have a reasonable basis for drawing an inference, which I might not draw, depending on the entire record of the hearing. But if facts X, Y, and Z were heard on the tapes and then after hearing the tapes the responsible official comes down to

the United States Attorney and imparted information, the trier of the facts might infer reasonably that what he heard is what he told.

MR. PEDOWITZ: Your Honor, let me address myself to that issue.

THE COURT: You don't think this is the court of last resort, do you? Don't you wan't a complete record in this matter?

MR. PEDOWITZ: We do, but we don't want to burden the Court with this already burdensome proceeding.

Let me frame the issue because I think the affidavits make entirely clear what Mr. Fein was doing in this particular case or what he sought to do. He sought to advise the Federal prosecutor only of a potential tampering with a witness. That was his sole purpose, and he makes it entirely clear that he was concerned about potential taint or possible taint if there should be some illegality in the wiretap determined at some subsequent point. All he came down here to do was to inform Mr. McGuire of the potential tampering. That's all he did.

Your Honor, to have the tapes transcribed, and if they are to be transcribed I would hope they would be transcribed by the defendants because we certainly have no primary interest in having them transcribed.

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MR. DERSHOWITZ: Agreed, your Honor. We would do all the work. We would take the tapes, listen to them, transcribe them and present what we thought was relevant.

THE COURT: I don't think in the absence of agreement I would turn over the tapes to you without an in camera listening to them. I would hope the important tapes could be segregated from the nonsense tapes.

MR. DERSHOWITZ: It might be relevant to your Honor's decision in this regard that the tapes were supposed to be turned over to Mr. Ostrer in connection with the State proceedings. It was only because of Mr. Ostrer's indictment being dismissed in the State Court that they were not turned over. We don't understand that the State has any objection to turning over the tapes. The Federal prosecutor has no basis for making an objection.

MR. PEDOWITZ: I think the Government would certainly have standing and an interest in opposing what must be necessarily a lengthy and irrelevant hearing.

THE COURT: I think the tapes have to come into custody of this Court and then access to them regulated by this Court. They become potentially admissible evidence on this hearing.

As I understand it, a conference with Julius

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November was heard; is that right?

MR. DERSHOWITZ: No, your Honor. There were numerous conferences. Virtually daily phone calls between Mr. Edelbaum --

THE COURT: Should the tapes be limited to the part which have to do with the purported attempt to muscle the witness?

MR. DERSHOWITZ: We think absolutely not. We would try to establish at a hearing that a full report was made, as you indicated. We think, and we are sure on the basis of our interviews with these witnesses, there was no obstruction of justice and the tapes will so indicate and will undercut the Government's case, as the best evidence of what transpired.

The Moss discussion involved several other people.

THE COURT: All that the State came down and told the Federal people about was the Aubry Moss discussion; is that correct?

MR. DERSHOWITZ: No, sir. They admit there was a discussion of background of Mr. Ostrer. What I would like to know is what that background was. We would like to ask directly that here is some background you heard on the tape. Didn't you think it relevant to tell Mr.

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McGuire about that? We will do all the work and we don't see the objection of the Federal Government. Their objection is only a time objection. We represent we will do this as quickly as possible, and we see no reason why the tapes shouldn't be turned over to us. We agree to have them turned over to either the Government or the Court, unless the State interposes an objection. I think that is a needless burden of your Honor's time.

THE COURT: I will have to look at this situation. I ask you in the meantime, Mr. Pedowitz, to ascertain whether these tapes could be obtained by the Government and duplicated. Then you will have a set and Mr. Dershowitz will have a set. He can transcribe those parts of the tapes that he thinks the Courts ought to have for this motion and you can do likewise.

I give that to you as a tentative suggestion. I am making no ruling at this time.

MR. PEDOWITZ: I will inquire with the State, your Honor. Under State law the tapes must be held by a Supreme Court Justice, as I understand. They must be held under seal. I have been advised by Mr. Campriello, because I discussed this matter with your law clerk in the early summer, that the State does have copies of these tapes, the State prosecutors have copies of these tapes, but

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frankly I don't know whether Mr. Dershowitz would be agreeable that the copies of the tapes would be the best evidence.

THE COURT: Don't raise specters. I'm sure the State prosecutor represents they are good copies and the originals are held under seal, that Mr. Dershowitz isn't going to raise any problem over that.

MR. PEDOWITZ: Maybe we can have a statement from Mr. Dershowitz on that.

THE COURT: Let's find out. Let's not discuss "maybe" questions. Let's find out what the facts are and deal with them

MR. PEDOWITZ: If there is no objection of Mr. Dershowitz, then I will ascertain from the State whether the prosecutor will supply me with the copies.

THE COURT: Find out the facts and communicate those to your adversary with a copy to the Court. If need be, you may have to make a joint application to the New York State Supreme Court to get these original tapes. I think that Court has a power, in the interest of justice, to release them. I am not going into the question of whether I have subpoena power over the Supreme Court Justice who holds the tapes.

MR. DERSHOWITZ: The Justice has already made

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an order. It was done in the Ostrer case. We were scheduled to hear those tapes when the State came in and threw in the towel.

THE COURT: Why don't you together stipulate they can be delivered to the United States Government and duplicated so each of you will have a copy and the originals will be available?

MR. PEDOWITZ: I would ask you once again to take a look at the affidavits and determine whether or not this is just a foray into cross-examination technique which I don't particularly approve of.

THE COURT: From what I heard today I cannot really reach that conclusion. Assuming things have been fairly represented to me I couldn't reach that conclusion because I think it is a reasonable argument to make that if the tapes showed facts X, Y and Z and a responsible official heard the tapes and thought he was dutybound to go to the Federal officials, that he may very likely have told the Federal officials what he knew. That is common sense and reason, isn't it? I am not making any such finding, but I am say ing that is a good enough argument to make.

MR. PEDOWITZ: You feel for evidentiary purposes that the defendant should be supplied with those tapes? If

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that is your conclusion, I will.

THE COURT: I think they should be limited to the things which clearly have to do with this case.

Julius November was a member of the New York State Legislature, wasn't he?

MR. DERSHOWITZ: May I confer with my client on that?

(Pause.)

MR. DERSHOWITZ: Mr. November apparently is a lawyer of 40 years experience and a member of the bar.

THE COURT: The name Julius November rings a bell with me and I think he is a former member of the Legislature whom I knew. If that is of any concern to any of you, it ought to be disclosed. It would not affect me, but I thought I would disclose it.

MR. PEDOWITZ: I would like to settle as many of the procedural issues as possible because the Government is interested in getting on with this matter.

THE COURT: The Court has not read all of the proliferation of papers. The Court has no familiarity with the proceedings before the prior assigned judge. The Court firmly believes instead of being inflicted ith 40 pages of material, the attorneys should tell the Court in two or three sentences what they want to do and I will

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decide what to do.

MR. PEDOWITZ: If your Honor has decided that the tapes be gotten by the U. S. Attorney's office and copies be made available to Mr. Dershowitz --

THE COURT: I have not decided it. It seems reasonable to me. If you are prepared, then you ought to do it.

MR. PEDOWITZ: I wouldn't do it unless your Honor ordered it.

THE COURT: I will have to read the papers first. It seems the part of the tapes which have to do with the issue here have to be made available.

MR. PEDOWITZ: I assume that Mr. Dershowitz, if your Honor subsequently rules that we are indeed going to make the tapes available to Mr. Dershowitz, will somehow narrow the field, in essence sit down and make a listing of which conversations have to be transcribed and which ones do not?

MR. DERSHOWITZ: By all means.

THE COURT: If I were in your position I would make my own decision because Mr. Dershowitz is going to take what he thinks will lead to favorable fact finding for him and you should do the same.

MR. PEDOWITZ: We will, of course, do that and

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we will supplement Mr. Dershowitz' request.

What I am trying to determine now is whether it will be necessary to transcribe all of the tapes.

THE COURT: Of course not. You will transcribe what you think is relevant and he will transcribe what he thinks is relevant. The Court isn't going to take evidence unless it is proper to the Court. I am not going to take in this type of matter a tape and listen to it. I would like to have it in black and white.

You are not going to dispute the validity of such transcripts by making the Court hear the tapes, are you?

MR. DERSHOWITZ: We have no present intention to do that, your Honor.

THE COURT: You satisfy yourself as to the accuracy of your adversary's transcripts by hearing them and reading them.

MR. DERSHOWITZ: I will do so.

The other issue which is open is this:

We would like permission of the Court to make further inquiry about the status of Miss Rush as a patient in a mental hospital.

THE COURT: We will talk about Miss Rush for a moment.

Have you given your views on Miss Rush?

MR. PEDOWITZ: Your Honor, I am not as familiar with that issue as I ought to be because I have never read the Court's decision which precluded further examination into Miss Rush's condition or her whereabouts or any other facts about her background. I expect the Court was seeking to protect the juror and was relying on certain precedents which would preclude a post-trial examination into the competency of a juror.

THE COURT: Just thinking out loud, as I understand it, and again this is a suggestion looking towards advancing this matter and not a ruling; as I understand it, it is suggested by Mr. Dershowitz that if in fact she were an inmate of a mental institution duly committed, working as a patient's aid there or a work patient, if you like, that that would as a matter of law entitle the defendant to a new trial. Now, if that is so, that may bring this matter to a very abrupt conclusion because the Court might not need to go any farther in the matter and any issues about the tapes would remain for a future date when and if the Government elected to proceed with the new trial, and you might never even reach them.

MR. PEDOWITZ: I have never personally briefed the issue as to whether or not there should be any additional

examination into the juror.

THE COURT: I wouldn't permit any examination of the juror. I might open the door to the extent of authorizing you either to take the deposition of Flower Fifth Avenue hospital by its personnel manager, clerk, or whoever takes the hospital census, or if that isn't satisfactory to you, I could have the magistrate conduct a hearing at which Flower Fifth Avenue officials would testify. Conceivably, I might permit you to have a brief hearing right here before me on that.

It seems to me very simple. If Flower Fifth Avenue Hospital knows whether on these dates in question this lady was a patient or an employee. That can be done by permitting you to take the deposition of Flower Fifth Avenue Hospital. That wouldn't bother this juror at all.

MR. PEDOWITZ: Our position is twofold. We believe there is no newly discovered evidence in this case with regard to the juror. Mr. Dershowitz' construction of the phrase "patient-attendant" is belied by the record. And further questions of the juror that she was employed by Flower Fifth Avenue Hospital for the past four years and only the last year was she a patient-attendant, that would belie the fact that she was patient-attendant for four years.

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THE COURT: It is so much easier to find out than it is to argue it. We are not getting any jurors in here if I can humanly avoid it.

MR. PEDOWITZ: There is a policy against looking into the competency of jurors after a verdict, and I would like to have the opportunity to brief that issue before your Honor ordered any change in Judge Edelstein's order precluding any examination into this juror's competency.

THE COURT: You see, sometimes instead of being so theoretical, we ought to go right out and resolve it. If you find she is an employee and not a patient, all the argument of this morning falls.

MR. DERSHOWITZ: May I make a constructive suggestion, your Honor?

The Government itself on page 22 of its brief cites the following procedures in the event sufficient facts have been adduced to require a hearing. They suggest four or five steps how a hearing could be held without calling Miss Rush. This is the Government's own suggestion. There are four steps that are required, and it says:

> "The procedure outlined above would provide maximum safeguards for the juror's individual rights of privacy",

citing Miller versus United States, a Second Circuit case,

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1968. That is the Government's own suggested procedure.

THE COURT: You told me that you have reasonable grounds to believe that her capacity at Flower Fifth Avenue was that of a patient rather than an employee, and that fact could almost be verified by telephone but for the fact you are stayed by the Court. I would think, if all of you want to be practical, in the time it has taken to talk about it here we could find out whether you are right or wrong. If you turn out to be right, then the Government can still raise all of these questions which it does.

MR. PEDOWITZ: There may be interests here of privacy, of not looking into a verdict and questioning the competency of jurors after the verdict. Important policies which would preclude examination which Mr. Dershowitz is asking for. For that reason I would like an opportunity to brief that issue, if for no other reason than to familiarize myself with the authorities, and not concede an issue which may later come back to haunt the Government.

THE COURT: Isn't it true but for the Chief Judge's stay order, the first thing both of you would have done would have been to phone the Flower Fifth Avenue Hospital and ask what her status was, whether a patient or employee?

MR. PEDOWITZ: Your Honor, if that were the

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case then I would certainly be conceding the issue. I am not certain that that would be the Government's position.

THE COURT: If the answer is she is an employee, the whole argument is over.

MR. DERSHOWITZ: There are often situations where the Government opposes further inquiry, and the law on that is when there are such situations doubts must be resolved in favor of a new trial and against the Government.

Any court reporter knows it is not his job to take down hyphens. If it says patient-attendant, the record in this case would require a new trial.

THE COURT: If she was an employee, she was an employee; if she was a patient, she was a patient. What the record says or whether there is a hyphen or not --

MR. DERSHOWITZ: I agree with your Honor, but if we can't find anything out beyond that, if we have to decide whether Mr. Ostrer goes to jail or stays out of jail on the basis of a missing hyphen --

THE COURT: We aren't.

MR. DERSHOWITZ: But if we have to do it, the answer has to be a new trial. He cannot be sent to jail without further inquiry on the basis of this record.

THE COURT: I will have to read these papers. I am afraid we haven't reached any conclusions on much.

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MR. PEDOWITZ: Mr. Dershowitz wishes to confine the policy which I am advocating to a right of privacy of the juror. There is also the matter of not attacking verdicts after they have been rendered an --

THE COURT: That strikes me as rather cold. If you had in fact a committed insane person on your jury who really was confined to a mental institution for five years and she winds up down here as a juror, I would find that rather shocking.

MR. PEDOWITZ: In what fashion can this be found to be newly discovered evidence, if it is found in the transcript that an attorney sitting next to his client listened to the voir dire of the jurors? I can't understand this is newly discovered evidence.

THE COURT: If I had someone come in and say he was a patient-attendant at Flower Fifth Avenue Hospital, we know that Flower Fifth Avenue Hospital is not a hospital for the chronically insane. They would send you out to Kings Park. If we heard that here and some attorney came to the side bar and said that I ask your Honor to ask Juror No. 5 if he is a patient or employee, I would really feel offended. I would think it was ludicrous. That is the way it strikes me.

MR. PEDOWITZ: In what fashion is this evidence

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newly discovered?

MR. DERSHOWITZ: May we respond to that? It is not a question of newly discovered evidence. It is a question that the Court of Appeals premised its decision on an assumption related to the state of the record which we have now challenged. It is not the typical newly discovered case.

THE COURT: Your challenge may be totally unfounded. Were it not for a stay order of this Court you would have verified it.

MR. DERSHOWITZ: Exactly. We wanted to. In fact we asked the predecessor whether we could that. We asked for a construction of the order.

It is relevant for your Honor to know also that the order of the Court originally was entered into at the request of the defendant. The defendant was concerned -- I wasn't the lawyer at the time -- the Government would speak to the juror initially. This was a highly publicized case. It was not premised exclusively on the privacy of the juror as evidenced by the fact that the Government itself made a suggestion of how a four-step hearing could be held and conceded on the record that that hearing would not violate the privacy of this jurors.

What we ask for is for the Court to open up

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the investigatory process only in so far as the Government at a prior time indicated it should be opened up. Not one step beyond that.

THE COURT: I find it highly unlikely that this woman was in fact a committed patient at Flower Fifth Avenue Hospital. It doesn't seem likely to me. I think you can resolve that question in less time than we spent here this morning.

MR. DERSHOWITZ: In making that decision you should read the entire letter which is reproduced fully in Judge Feinberg's dissenting opinion in the Court of Appeals.

THE COURT: You are making the point that you believe, based on an inference drawn from her statements on voir dire, that she was a committed patient rather than an employee.

MR. DERSHOWITZ: Our point is this: The Court of Appeals said that the threshold fro a hearing had not been reached. That decision, that the threshold for a hearing had not been reached, was made on an assumption she had a four-year work record in the hospital and had not been a patient.

THE COURT: Rather than a four-year confinement record.

MR. DERSHOWITZ: That she was confined or

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certified. We think that if that is undercut, then surely the threshold is overcome. And this is a very close case, your Honor. I don't know if your Honor is aware of the fact that it is reported in the record that Judge Friendly stated to Judge Edelstein that this was a very close case that could have gone either way on appeal. This was a close case to begin with.

THE COURT: Now most cases are close cases. Don't belabor it. I think I understand. I am going to ask you to not assume my complete stupidity, either of you.

MR. DERSHOWITZ: I was not, your Honor.

THE COURT: We have to shorten these matters, get to the heart of them and find out what the facts are.

To summarize what we have done today, I will go through this matter and make a firm direction. But do I understand that you are agreed that you will attempt to get the tapes from the State and arrange for the originals to be placed in the custody of the Court and copies of the tapes given to each side here? Is that what is being done?

MR DERSHOWITZ: You had indicated you would rule on that question.

THE COURT: You are not prepared to do that in the absence of a ruling?

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MR. PEDOWITZ: Yes.

THE COURT: Then I will take it under advisement.

How many reels of tape are there?

MR. PEDOWITZ: I don't know the answer to that. At one point I did and I have simply forgotten.

THE COURT: Do you know?

MR. DERSHOWITZ: We don't know, your Honor. We were told many hours of tapes. But we will take the burden of doing all the work in that connection. The faster we can get the tapes, the more quickly we can have an expedited hearing.

THE COURT: If there is anything done with the tapes I would like the tapes to proceed directly from State custody to Federal custody. I do not want the tapes to be out floating around in anyone's possession, except if it be joint possession of both attorneys or the Court's possession. I want to make that clear.

MR. DERSHOWITZ: We agree with that, your Honor.

THE COURT: Regardless of what the State may have said. I don't want you unwittinglyto cast any taing on the genuineness of the tapes. If you want to stipulate to use the State prosecutor's copies, that you may do.

You have time to go call him up and ask him if there is any risk involved in that.

MR. DERSHOWITZ: We would certainly agree to speak to Mr. Campriello and at least initially use his copies. We have no objection to that.

THE COURT: You say "initially". I don't want the Government to put a lot of work and effort into the copies and then have someone say that the transcripts you made are no good.

MR. DERSHOWITZ: We are 99 per cent certain that we would be prepared to stipulate they are correct copies. If we hear an 18-minute gap in the tape, we are not going to be bound by the stipulation. It is ojly out of an abundance of caution, your Honor. Other than that we would stipulate we would accept Mr. Campriello's offer.

THE COURT: I think the way you go about it is to talk to Mr. Campriello and ascertain whether you are reasonably safe in doing that.

All right, gentlemen, I don't think there is anything further that can be done today. I will reserve decision.

I have made tentative suggestions to Mr. Dershowitz that he talk to Mr. Austin Campriello as lawyer to lawyer and say, look, I am opening up the question of

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these tapes in the Federal Court. Will be safe in proceeding with the copies or is there going to be any question as to their completeness and accuracy? I think Mr. Campriello will tell him in the event there is a problem to be smart and use the originals, or that you have my assurance that the copies have been regularly maintained and they are every bit as good as the originals.

MR. DERSHOWITZ: Do we also have agreement from the U. S. Attorney that if Mr. Campriello is prepared to turn over the tapes, the U. S. Attorney would not oppose or object to that procedure?

THE COURT: Copies of the tapes?

MR. DERSHOWITZ: Copies.

THE COURT: I wouldn't allow the originals. The originals aren't going anywhere except the Court or to joint custody.

MR. DERSHOWITZ: If Mr. Campriello agreed the U. S. Attorney would pose no objection to that?

MR. PEDOWITZ: I don't think I would have any standing to object to what Mr. Campriello does. What he does without an order of this Court is his own business.

THE COURT: You see, evidence is no good unless you can admit it. What Mr. Dershowitz is really saying is if I get a hold of the copies, am I going to have any

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trouble in introducing them in evidence?

MR. PEDOWITZ: If that is what he is saying, if Mr. Campriello represented to me they were true copies and Mr. Dershowitz represented they weren't altered, I would have no objection to putting them in.

MR. DERSHOWITZ: All right.

THE COURT: Thank you, gentlemen.

(Discussion off the record.)

THE COURT: Back on the record.

The Court understands you are now on bail and you are continued under the terms of your existing bail. You are instructed that you are to stay in communication with your attorney so he can reach you and you are to be here at any other or further proceedings that this Court may direct.

You are informed also that failure to abide by those directions would constitute an independent crime of bail jumping, without regard to your guilt or innocence in this case, and separately punishable.

Do you understand that?

THE DEFENDANT: I have never failed to appear once.

THE COURT: I didn't say you have. I am merely instructing you as to your obligations. You under-

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stand your obligation?

THE DEFENDANT: Yes.

MR DERSHOWITZ: In the event a hearing is ordered in this case, may I request being in touch with your chambers. I am a full-time teacher and I teach Monday, Tuesday and Wednesday and I am available Thursday and Friday. I of course would be available on Monday, Tuesday and Wednesday if necessary.

THE COURT: I will try not to impede your teaching. If the clerk calls you, you tell him what your problems are.

MR. DERSHOWITZ: I appreciate that.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

vs. :

LOUIS OSTRER, : 71 Cr. 558 (CLB)

Defendant :

- - - - - - - - - - - - - - - - - x

Before:

Hon. Charles L. Brieant, Jr.,

District Judge

New York, N. Y.

December 19, 1975 - 12 noon

APPEARANCES

Thomas J. Cahill, Esq.,
United States Attorney
For the Government
By: Lawrence B. Pedowitz, Esq.,
Assistant United States Attorney

Alan Dershowitz, Esq. and
Harvey Silverglate, Esq.,
Attorneys f Defendant

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MR. PEDOWITZ: Ready for the Government, your Honor.

MR. DERSHOWITZ: Ready for the defendant, your Honor.

THE COURT: All right. Gentlemen, this is a continuation of the hearing which I began previously with respect to Mr. Ostrer's Rule 33 motion, and you have all, of course, received my October 8th memorandum and order and I wanted to address myself first to the aspect of Mrs. Rush.

The Court has attempted to balance, in this matter, the rights of the accused with the rights of the juror, who should not have her affairs pried into, and a subpoena was issued and served which required records of the Flower Fifth Avenue Hospital to be delivered directly to my chambers, and that subpoena was issued on November 11th and served on the 12th.

A file has been returned to the Court pursuant to that subpoena by Mr. James A. Lewis, whose title is the Benefits Manager of New York Medical College, and that file contains two separate documents, perhaps I should say three documents.

One of these documents is merely payroll changes for Mrs. Geneva Rush and requisitions for her uniform allowance, and I consider that irrelevant to this particular

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hearing.

There is an additional document, a set of central records, socalled, made for the computer to indicate pay and employment status; and also another document, called a pre-employment checkoff list, and an employment application form.

What I propose to do with these documents is to read into the record the relevant material therein and then I will permit counsel for Mr. Ostrer and counsel for the Government to inspect these personnel r-cords here today in my presence, to ascertain that the Court has correctly stated the facts therein, and if there are any other facts indicated by the document which you wish to have me make a finding concerning I will do that also, and then I am going to seal these as part of the records in the case.

I am following that procedure in order to serve the two necessities we have here, one to find the truth about Mrs. Rush's status with the hospital, and the other is to protect Mrs. Rush from undue burden as a result of having discharged her public duty by serving as a juror.

I will state now for the record that the file contains the following documents:

There is an application for employment on a printed form of the New York Medical College-Flower & Fifth Avenue Hospitals, and that hospital, under the heading "Type

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of Work Desired," the word "nurses' aide, any shift." And someone has put in next to it "P/Att," which the Court takes it stands for patient attendant.

The lady states there that she can start working as soon as possible, shows herself to be a high school graduate, and gives prior work history as a silk finishing employee in a dry cleaner's business in New York City and work as a nurses' aide in the Baltimore General Hospital between 1950 and 1952.

The application is in all other respects a routine employment application signed by Geneva Rush on February 25, 1969.

The next document in the file is a reference from Mrs. Carter, Dean of Women at the YMCA, 180 West 135th Street, to the effect that applicant is an honest person, that her general ability is good or dependable, and cooperativeness is very good, her sense of responsibility good, and her character above reproach.

That is undated. It shows that the position applied for is that of nurses' aide. There are a couple of other similar references attached, and then a reference to the Nursing Department from the Personnel Department dated March 11, 1969.

It says, "Name of applicant: Geneva Rush. This

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applicant is being referred to you for consideration re the position of P/Att," which the Court takes to mean patient attendant, "eve shift."

The balance of the file shows that she was in fact employed from March 17, 1969 as, a job title, "Pat. Attendant," that she was a regular, full time employee and a member of the regular collective bargaining unit.

It shows that she had a uniform allowance and indicates her status as divorced, her citizenship is United States, and the file suggests a regular history of employment in the capacity or job title of patient attendant, which is spelled out on at least one of the forms which I am presently looking at.

It shows that she was employed under a union contract, and there is a check mark in a box which says "per union contract"; that she received a uniform allownace; and at least one time in 1970 she was working on the evening shift full time.

The addresses listed her are not the addresses of the hospital, suggesting to the Court that she had places of residence oth-r than in the hospital. And, as I said before, the record clearly shows that she had a laundry allowance, a uniform allowance and a full time salary per union contract.

Her shifts varied. She did not always work the evening shift. She received shift differentials when she worked the evening shift.

There is an entry as of January 6, 1971: "We have checked your records and have found that to date you have had nine sick days. You are hereby advised you have a total of thirteen sick days until your anniversary date, date of hire, in 1971."

Now, I think that is a full statement of the material produced pursuant to the subpoena relating to Mrs. Rush.

There is an additional document dated March 12, 1969, which suggests that she took a pre-employment physical examination. There may be some doubt as to the validity of that inference, but the paper could be so read.

Now, I'm prepared to take a brief recess and permit counsel for the Government and for Mr. Ostrer to examine these documents, from which I have been making the statements that I've just made, in the presence of the Court. Following that I'll direct that they be sealed and I'll deal with any further requests which you may make as a result of your examination.

I think it is fair to state that everything in the file which the Court has seen points to Mrs. Rush as

being a full time employee of the hospital, a union member, in the hired capacity of a patient attendant, and not living in the hospital but living at various other addresses therein set forth, where she moved to from time to time.

Now, is there anything further that any of you want to say on the record before I have the examination?

MR. PEDOWITZ: Nothing, your Honor.

MR. DERSHOWITZ: Nothing from the defendant, your Honor.

THE COURT: All right.

The record will show that the Court's use of the word "Geneva" as the first name of the lady is the name borne out by the file and not Genina, as it has been from time to time stated, including by my own memorandum order.

(Pause)

MR. DERSHOWITZ: There is one note that we might want to note or bring to your Honor's attention. I don't have the vaguest idea what it means, except that the address is listed as H.E.W., which sounds like it might be the Department of Health, Education and Welfare. And since the Department of H.E.W. does run facilities --

THE COURT: All right. What was the date of the trial in this case?

MR. DERSHOWITZ: January 1973.

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THE COURT: All right. This is dated July 1, 1973. So I don't believe it means that. I think somebody has just written a number here in a place that is ordinarily used for an address change. But I'll disregard that because that is after the verdict.

(Pause)

MR. DERSHOWITZ: Your Honor, under the circumstances, it is necessary to point out all ambiguities. They may just be ambiguities.

THE COURT: I understand. That is what you are examining this document for, in order to permit you to point out any matters which you think are of concern.

MR. DERSHOWITZ: Under "Address change" there is a symbol that could possibly be a large P, and I just note that because of its possible relationship to the word "Patient."

THE COURT: All right. I'll bring the man down here and get him to tell us what it means. This is an entry for November 1, 1970.

I have to tell you that I think you found a dry hole as far as Mrs. Rush is concerned. But, if you think that P down there is a P, and if you think it means that she was a patient -- she told me she had no patient files for her -- I'll get the man to come down and explain to me what

"P" is.

MR. DERSHOWITZ: As I say, your Honor, I am just pointing out possibilities as I go through it.

THE COURT: I understand. That's what I want you to do.

MR. DERSHOWITZ; All right. Thank you.

(Pause)

MR. DERSHOWITZ: Again, your Honor, we have no reason to suspect this means anything, but it would be interesting to find out what "CBU" means. None of the three of us have been able to figure it out.

THE COURT: The Court understands that "CBU" means collective bargaining unit.

MR. DERSHOWITZ: Fine. That seems reasonable.

THE COURT: The scope of this hearing is to ascertain whether the lady perjured herself on the voir dire and deluded trial counsel so that he permitted a psychotic patient to stay there, believing that she was a fully employed, working person serving in the job title of patient attendant at a substantial hospital.

That's what I am here to determine, not to pick on every little nit that is on these papers.

MR. DERSHOWITZ: We understand that.

THE COURT: But you continue with your examina-

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tion and I'll deal with each matter as it comes up. But the real issue before me is did she lie on the voir dire.

(Pause)

MR. DERSHOWITZ: Just to have the record complete, under "Address change" there is again given a series of numbers which conceivably can be a wrong number. I just point it out.

THE COURT: All right. I will look into that. You have reference to an entry which appears as if it is dated 3/1/70, and I'll attempt to find out what they mean by that.

You see, if it were shown she had occasionally been a patient, that would not lead to a conclusion that she lied or misled counsel on her voir dire examination, which is all we are really here for. It was suggested by you, and I thought the suggestion had merit, that perhaps the statement that she was a patient attendant at Flower & Fifth Avenue Hospitals was meant by her tosay that she was a patient who helped take care of the other patients.

That was the argument made before me when you were here before, on September 5th, and that argument turns out to be totally without foundation in fact. The underlying factual basis for it is simply non-existent.

All right.

(Pause)

MR. DERSHOWITZ: Your Honor, at least we would like to make a note of the fact, in the event it is relevant, that she did receive -- perhaps we shouldn't put this on the record, public record. We would be happy --

THE COURT: No. I wish to have a complete record here. The record may show that there was a disciplinary warning notice filed September 16th, 1970 and it says that on September 2, 1970 the juror failed to report on duty and did not call nor notify anyone of the reasons for her absence and that she was warned and admonished.

But I must focus your attention again on the purpose of this hearing and again repeat that I do not believe in post-verdict interrogation of jurors or investigation of jurors or harassment of them. It just turned out that the suggestion made about this juror, that she might in fact be a psychiatric patient rather than a full time employee, was so significant under the circumstances that the Court believed that there should be further inquiry.

Now, the further inquiry, in my opinion, clearly shows that the lady was a full time employee, a member of the collective bargaining unit, receiving a uniform allowance and what may be described as a reasonable salary, and that there is just no substance to this argument.

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However, these matters cannot be litigated in a vacuum and the only way that I can be sure of having an adequate record is to permit this type of examination which is going on right now, following which I will see these documents for any consideration which an appellate court may require.

MR. DERSHOWITZ: Your Honor, we would also have no objection, just for the record, even to have this part of the proceeding sealed so that Mrs. Rush's name is not --

THE COURT: Her name is already in the reported cases under the Dioguardi decision.

MR. DERSHOWITZ: I understand that. I mean as far as, for example, the disciplinary matter. We have no reason to have that on the record.

THE COURT: That can happen to anybody, that they don't show up for work and don't call in ahead of time and get warned and admonished. That is commonplace. Anybody who hasn't had that happen to him or her in their career either has a very easy job or has been lucky. It certainly has no bearing on the validity of the voir dire conducted by the trial court.

MR. DERSHOWITZ: Here, your Honor, I do think we should note that the record indicates she has been cleared

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by some medical group to work. Again, that is possibly consistent with the routine.

THE COURT: This is the date of employment, March 18, 1969, a new employee.

MR. DERSHOWITZ: We only note that in the sense that each of these standing alone may mean nothing, and indeed all of them together may mean nothing, but --

THE COURT: Wait a minute now. Let's address ourselves to this document. Can you find any inference from this document other than that this person, and others, was cleared to work by the Health Service --

MR. DERSHOWITZ: Only, your Honor, that it is possible that --

THE COURT: -- on March 18th.

MR. DERSHOWITZ: -- that routinely people aren't considered for medical examinations.

THE COURT: Oh, garbage. Let's go on with this examination. That is silly. That is just simply ridiculous. The employment documentation there suggests that they intend to have her examined. It is right on the printed form.

Do you think you can go to work in a hospital without having an examination?

(Pause)

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MR. PEDOWITZ: Your Honor, I note that one of the questions on the application is, "Have you been under the care of a physician during the past five years?" and the answer which follows is "No."

THE COURT: All right. That's just about as irrelevant as the observations which defendant's counsel have been making from the file. But the record may so indicate.

I want both of you to focus on the fact that we are talking about the validity of the voir dire in this case, whether the jury member misled the examiner or whether the attorney, concluding whether or not to exercise his peremptory challenges or his challenges for cause, was inadvertently misled to the detriment of his client by the answers which the woman gave which led him and the Court to believe that she was a full time employee of the hospital and which, it was contended quite plausibly on the motion before me, should have indicated that she might have been a psychiatric patient in the hospital who was being allowed to work on the ward and assist in the care of other psychiatric patients.

It is a perfectly plausible argument. That is the reason why I conducted this hearing here, and I thhink the answer to it is clear beyond peradventure.

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(Pause)

MR. DERSHOWITZ: Can we go off the record for one second?

THE COURT: I prefer you not be off the record.

MR. DERSHOWITZ: By all means. I just wanted to indicate that we didn't see the pre-employment checkoff list, which indicated that a medical examination is routine, until the very end.

THE COURT: Yes. But I stated that in my resume of the file on the record that I made before you began.

MR. DERSHOWITZ: I'm sorry. We didn't catch that.

THE COURT: All right. I'm not certain that that is the inference which follows from the document. But perhaps it is.

(Pause)

THE COURT: At this time I will have the Clerk mark for identification the two documents, a group of documents which are clipped together as Exhibit 1 and a pre-employment checkoff list dated March 12, 1969 as Exhibit 2, and the payroll check record, which the Court did not exhibit to counsel, as Exhibit 3, and the subpoena itself as Exhibit 4.

And the Court will direct that these documents

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be sealed, not to be reopened except upon order of the Court or upon order of a higher court.

(Court Exhibits 1, 2, 3 and 4 were marked.)

THE COURT: And I now find that there is no substance or merit to the claim that the juror Rush lied or misled the Court or counsel upon her voir dire examination at the time of the tiral, and that the documents produced pursuant to the subpoena by Flower & Fifth Avenue Hospitals show beyond peradventure, and the Court now finds, that Mrs. Rush was a full time employee of the hospital in the capacity of patient attendant assigned to the Nursing Service of the hospital and a member of the collective bargaining unit, receiving a salary and a uniform allowance.

Now, this brings me next, gentltmen, to the branch of the motion having to do with the tapes, and I would like to take a status report from you while you are here in connection with your compliance until now with the Court's October 8th memorandum and order.

Where do you gentlemen stand with respect to these tapes?

MR. PEDOWITZ: Your Honor, I believe the Government has had the tapes delivered to your chambers. I assume that is correct.

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(Pause)

THE COURT: I am advised that they were delivered to chambers by somebody. I did not know at the time who delivered them and simply assumed that it was the District Attorney of New York County who was making the delivery. And immediately upon their arrival in chambers, pursuant to my direction, they were delivered to the Clerk of this Court to be put in the safe, and I understand that's where they are.

I am insistent that a proper chain of custody be preserved with respect to these tapes. I don't want the tapes kicking around the courthouse or in the possession of one side or the other, where anyone later could raise any innuendo that they might have been altered or affected in any way.

I want to set immediately directions for the United States Attorney and counsel for the defendant to listen to the tapes jointly and to set apart, and if possible transcribe and make available to the Court, such parts of the tapes as they will rely on to support their respective contentions, and I think that must be done promptly.

This is an early 1971 indictment, and if there is to be a new trial, it has to be decided promptly; and if there is not to be, then that has to be decided promptly.

So I am going to make a suggestion to you that you go right to work on these tapes. It isn't simply enough to say "Yes, I think we ought to make a date." We ought to make a date by agreement.

Mr. Silverglate, are you going to do the tape listening or does Professor Dershowitz plan to do that himself?

MR. DERSHOWITZ: We plan to do that jointly and to divide the function to the extent possible. But we are prepared to proceed with despatch.

THE COURT: This particular time of year should be a very convenient time for everybody. There are not a lot of jury trials going on here.

I would like to have you start together on Monday. I don't see any reason why you couldn't start Monday. Make arrangements through chambers or with the Clerk of the Court or with the U. S. Attorney to get a safe room where they can be kept and listened to, and Mr. Pedowitz will segregate and set apart those portions of the tapes that justify the inference he wants the Court to draw and the defendant can do likewise.

MR. DERSHOWITZ: What we think would expedite matters most, if possible, would be to have Monday, indeed as soon as possible, a certified authorized service make

duplicates of the tapes, that is, make transcribed duplicates of the tapes, let the originals remain in the courthouse, let there be a duplicate for the United States Attorney and a duplicate for us.

We would prefer to do it alone, and I think we can do it much more quickly if we did it alone. We can do it day, evening --

THE COURT: You are prepared to stipulate that it can go to a particular named service for that purpose?

MR. DERSHOWITZ: Yes.

THE COURT: How about you, Mr. Pedowitz?

MR PEDOWITZ: I am perfectly in agreement with that, your Honor.

THE COURT: All right. I hesitate to make this inquiry, but how about the cost of this operation?

MR. DERSHOWITZ: We would be prepared to divide that cost with the Government.

THE COURT: You are? All right.

Is that agreeable?

MR. PEDOWITZ: Your Honor, I don't want to commit myself to any financial endeavor which I can't get agreement for in my office. I'll have to check.

THE COURT: You had better find out very promptly, because the alternative to that will be that people

are going to come in and, just as if you had a trial, you are going to sit and listen to the tapes. That is the only other way to do it, listen during business hours jointly, and you can skip over the material that you find irrelevant and cull out, each of you, what you think ought to be presented to the Court.

The Court does not intend to listen to any tapes that are not relevant to the issues of this motion. I will only listen to the tapes, those portions of the tapes, which each of you say substantiate your contention here.

Now, there remains the evidentiary question of exactly what information Mr. McGuire received from the Assistant District Attorney of New York County who had been privy to the tapes, and it may well be that I will have to have an evidentiary hearing on that as soon as you finish listening to the tapes, because I don't think the proper witness could be cross examined very readily except by an attorney who has heard the tapes.

When I say "cross examined," I would say examined in chief as well as cross examined.

So, can we have a schedule on this? I'm assuming that you can get these duplicated, Mr. Pedowitz. If the Office can't pay for a simple thing like that, then things have come to a sorry state.

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MR. DERSHOWITZ: Could we have any idea at this point, better than we did previously, as to the exact number of tapes or exact length in terms of time? That would help us with the schedule, sir, the number of hours.

THE COURT: I certainly do not have any answer to that inquiry. I have never examined the tapes. The last thing in the world I want is tapes of this sort in my chambers, where they might be amenable to loss or theft or anything like that. I banished them immediately to the Clerk's safe and I did not count them or even open the box.

One other question is, does your arrangement with the District Attorney permit these to be duplicated?

MR. PEDOWITZ: I don't think that will be a problem, your Honor. We don't have the originals. We have copies of them.

THE COURT: I think you should go right at duplicating them and come back and give me a progress report in about three weeks.

MR. PEDOWITZ: I think that's fine, your Honor. The only estimate I have ever heard of the length of the tapes is 70 hours.

THE COURT: That is a lot of time.

MR. PEDOWITZ: I agree.

THE COURT: And most of it is probably clearly

irrelevant to this motion, and the only way to do it is to listen. This is a field day for the paralegals and the student assistants.

All right. I'll give you a date to come back and give me a progress report. I would hope you will be able to have listened to the tapes and at least culled out what's in there.

MR. PEDOWITZ: Your Honor, I will endeavor on Monday --

THE COURT: I hope there is more in there than there was in Mrs. Rush's file.

MR. PEDOWITZ: I will endeavor on Monday, if this is agreeable to Mr. Dershowitz and Mr. Silverglate, to have the tapes duplicated. I don't know whether they want to be here while I take them out of the safe and have them sent over to a duplicating service.

MR. DERSHOWITZ: We accept Mr. Pedowitz' assurances, as long as he maintains the chain of control and custody over them.

THE COURT: Do you understand what he means by "chain of custody and control over them"? That means you have to walk to the service and wait there while they duplicate them.

MR. DERSHOWITZ: No, no. I think it would be

enough if Mr. Pedow-tz personally took them over to the service and if it was a reliable service, used by --

THE COURT: All right. Clear the name of the service with counsel for the defendant.

MR. PEDOWITZ: Your Honor, is it sufficient that I have someone from my office deliver it, one of the messengers from our office? Obviously that person will be prepared to testify, if that becomes necessary.

MR. DERSHOWITZ: Yes, yes. I have no problem wi' that, as long as you take responsibility.

MR. PEDOWITZ: As far as waiting at the duplicating service, I think it may take --

THE COURT: He said you don't have to. So you are ahead on that one, Mr. Pedowitz. He said you don't have to. He is willing to permit you, assuming he knows the name of the duplicating service in advance, to have a responsible employee from the United States Attorney's office deliver them ot that service and pick up from that service.

Do I state it correctly, Mr. Dershowitz?

MR. DERSHOWITZ: Yes, you do, your Honor.

THE COURT: All right. And it is so ordered. Then, as soon as you get them back, you are immediately to go forward diligently listening. I would like you to come

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back and give me a [illegible] report at a date which I am about to fix.

MR. PEDOWITZ: I am wondering whether or not counsel can cut down on the number of tapes we have involved here if we can ascertain precisely what dates these particular tapes were made.

There was a meeting sometime in late 1972, I believe in December of 1972, between Mr. McGuire and Mr. Fine. Are we to undertake to listen to tapes which were made after the date of that particular meeting?

THE COURT: Was there only one meeting with Mr. McGuire and Mr Fine?

MR. PEDOWITZ: Those are the statements made in the affidavit, certainly, your Honor.

MR. DERSHOWITZ: Our position is as follows: We would like to listen to all the tapes that are available, although of course the Government is free to stop listening at any point it would like to. If we find nothing of relevance after the date on which it is stated no further communications occurred, we would of course communicate that to the Government.

Only if we find material subsequently which may cast doubt on the statement that no further communication was had would we --

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THE COURT: I would have to say, and I don't mean this critically, any responsible lawyer faced with this problem, whether he represents the defendant or the Government, ought to listen to all the tapes. That's just my own viewpoint. And whether they are admissible on the hearing or relevant after the date of the last meeting between Mr. Fine and Mr. McGuire is something I don't have to determine now.

But if you don't know what's on the tapes, you don't know what the problem is.

MR. DERSHOWITZ: Your Honor, in terms of dates, I would just like to make one personal request.

The week of January 12th to the 18th is a week that I had set aside for a vacation.

THE COURT: All right. Why don't I give you a date after you get back?

MR. DERSHOWITZ: The 19th or any time thereafter would be fine.

THE COURT: Is the 19th all right with you, Mr. Pedowitz?

MR. PEDOWITZ: That is perfectly fine, your Honor.

THE COURT: This hearing is continued for all purposes until four o'clock on January 19, 1976 in whatever

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courtroom is assigned to me at that time. And you, Mr. Ostrer, are continued on your bail until that time and place.

Do you understand your obligations under your bail?

THE DEFENDANT: Yes, I understand them, your Honor.

MR. PEDOWITZ: Your Honor, perhaps we can work out one further detail. I know that decisions are quite clear in this circuit about what ought to be done, what tapes are to be put into evidence at trial, namely transcripts that are to be circulated among counsel so that they ultimately come to agree as to precisely whether the transcripts accurately reflect what is on the tapes.

It seems to me it might be helpful here if we can remain in relatively frequent contact so that we can understand what tapes will become relevant in any hearing.

THE COURT: I think my October 8th memorandum is sufficiently clear and I expect all of you to behave in a lawyerly manner about this thing. I am not going to compel the production of transcripts on a non-jury question if the transcripts would be unduly burdensome.

And so I said in my October 8th order that the relevant portions or the parts which will be relied on in

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connection with the motion shall be indexed, segregated and marked and, if possible, transcribed. If it is impractical to transcribe it because of length or cost or delay, then, if it is simply segregated and marked and indexed, the Court will listen to it on a machine.

But, obviously, it would be reasonable, if it can be done, to have transcripts and have them agreed on as to correctness.

All right. The matter is continued for all purposes.

(An adjournment was taken to January 19, 1976 at 4.00 o'clock p.m.)

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MP

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	
vs.	
	71 Cr 558 CLB
JOHN DIOGUARDI and LOUIS OSTRER,	
Defendants.	

New York, N. Y.

February 9, 1976 - 4:00 p.m.

Before

HON. CHARLES L. BRIEANT, JR.,

District Judge.

APPEARANCES:

THOMAS J. CAHILL, Esq.,
United States Attorney for the Southern District of New York
LAWRENCE B. PEDOWITZ, Esq.,
Assistant United States Attorney

JAY GOLDBERG, Esq.,
Attorney for Defendant Dioguardi
MS. GRETCHEN WHITE OBERMAN, of Counsel

SILVERGLATE, SHAPIRO & GERTNER, Esqs.,
Attorneys for Defendant Ostrer
HARVEY A. SILVERGLATE, Esq., and
ALAN DERSHOWITZ, Esq., of Counsel

- - -

THE COURT: Good afternoon, counsel.

You had started to say something, Ms. Oberman?

MS. OBERMAN: Yes: just that I am appearing in lieu of Mr. Goldberg, on behalf of the defendant Dioguardi and that we will offer no argument but just join in the argument made by Mr. Dershowitz insofar as it may apply to Dioguardi.

THE COURT: Now, what is the problem concerning the tapes?

MR. PEDOWITZ: Your Honor, I have had copies of the tapes prepared for Mr. Dershowitz and Mr. Silverglate, and they were delivered as soon as I got hold of them. I expect they arrived some time in early January. I have personally had an SEC investigator, who is sitting next to me, Mr. Aguila, listen to all of the tapes. I have listened to pertinent portions of the tapes. I expect defense counsel has also had an opportunity to listen to the tapes in full, and, your Honor, we are prepared to go forward with the hearing at the Court's convenience.

THE COURT: Well, I am ready. I just want to hear what the status is.

How about you, Mr. Dershowitz?

MR. DERSHOWITZ: Your Honor, we received the tapes as stated, and we had copies of them made, and I have

listened to all the tapes, from beginning to end, all those that have been given to us by the Government. Mr. Silverglate has listened to all of the tapes from beginning to end. It was a mind-boggling experience to listen to all of these tapes.

We completed the task, and Mr. Ostrer is in the process of listening to the tapes, but we are now at the moment prepared to go forward with this proceeding.

THE COURT: Go ahead. You may proceed.

MR. DERSHOWITZ: Your Honor, we were not intending to go forward with the hearing right now. Was that your understanding?

THE COURT: That was my understanding from what you said. If you are ready, I am ready.

When I left this matter last, you were to come in on this return date, which was set by agreement of all counsel. When I say "all counsel", I suppose I have to exclude Mr. Goldberg's office, but on that date you were to have pinpointed and available to show the Court, preferably in transcript form -- although I did not specifically require that -- those parts of the tapes which you rely on as violating your client's rights and requiring that there be a new trial.

I thought that this afternoon you were going to

direct my attention to those parts of the tapes, and if you can give me a transcript, fine; if you can't, that you would play those parts. I am not going to listen to a whole month of tapes most of which has nothing to do with anything before me.

MR. DERSHOWITZ: By all means, your Honor, but our understanding was as follows: that today was supposed to be a status report on the listening of the tapes and a scheduling conference at which to arrange for a hearing, at which testimony would be taken, and we are prepared --

THE COURT: What is the testimony? I want to hear tapes, but I only want to hear those tapes that are relevant to your motion.

MR. DERSHOWITZ: Your Honor, the basis of the hearing, as we understand it, is to establish the chain of communication between Mr. Ostrer's conversation with his counsel about trial strategy and United States Attorney Maquire, and in order to do that, we will have to, at some appropriate point, play portions of the tapes, but we will have to examine Mr. Maquire, Mr. Fine, Detective Maquire, Detective Finley, and those are the four witnesses at this point on the basis of our hearing the tapes, we can represent to the court that we will have to examine.

THE COURT: Before I hear them, I want to hear the

segments or sections of the tapes that you rely on, because that would be my starting point. If I hear the tapes, it may be that I won't have to hear the witnesses, because the witnesses couldn't have heard anything more than the Court will hear.

So let's start with the tapes. That is what I thought you would be bringing to me today, and I thought you would get it boiled down to an area of the tapes that you feel violated his rights, because obviously there are some parts of the tapes that have nothing to do with the case.

MR. DERSHOWITZ: Well, there are many, many hours of tapes.

THE COURT: I understand that.

MR. DERSHOWITZ: And we have many, many hours of conversation ultimately that we would like your Honor to read or hear, or we would be happy to arrive at a stipulation with the Government as to the tapes.

THE COURT: Yes, but it has to be done soon. I thought I would have an hour or so to hear your tapes. I have been sitting here, all set to go to listen to something.

MR. DERSHOWITZ: It is our strong preference, for purposes of our own hearing strategy, to examine the witnesses.

THE COURT: You don't have to be concerned with strategy with me. I won't hear the witnesses until you show me enough tapes so that if the full totality of what was on the tapes was in fact communicated to the Federal prosecutor, you would be entitled to relief on this motion. That is the high-water mark at which you begin: what is on the tapes. If there is nothing on the tapes, then nothing communicated to somebody is still nothing.

So I have to presume that Mr. Maguire couldn't have received any data or information beyond that which is on the tapes. So I want to hear tapes, and I want to do it promptly.

MR. DERSHOWITZ: We can have tapes for you here very soon, your Honor, but I think you will understand when you hear the tapes two things: one, that there is considerable material on the tapes which violates the privileged communications between lawyer and client, but, number two, that there will be a need for an evidentiary hearing for purposes of determining precisely what the tapes reflect.

THE COURT: I am starting with the presumption that everything on the tape could have gotten to the Federal prosecutor, so I want to hear the tapes first, and I don't want to hear a lot of tapes that have nothing to do with the flowers in spring.

I want to get right down to the issue. I want you to give me those sections of the tapes. If you will give them to me in transcript form, fine. If not, I am going to have to hear, and I am going to have Mr. Pedowitz here, and I am going to have the machine play the tapes and have them marked for identification so the Court of Appeals can listen to them if the motion is decided. I suppose either side can appeal from the decision of this motion.

How soon are you going to do tha ?

MR. DERSHOWITZ: May I have a moment to confer with counsel?

(Pause.)

MR. DERSHOWITZ: May I have just one more moment to confer with the Government?

THE COURT: Certainly.

(Pause.)

MR. PEDOWITZ: Your Honor, maybe we can go back on the record and clear this up.

THE COURT: Yes. I never went off the record.

MR. PEDOWITZ: Your Honor, Mr. Dershowitz has just requested that I agree that had all of the information that was intercepted by the state been communicated to the Federal Government, there would indeed be a constitutional violation.

MP [8]

I assume by that Mr. Dershowitz means of the Fourth Amendment or the Sixth Amendment, as incorporated into the Fourteenth.

I frankly don't think that there could be too much dispute about that. Had all of the information which was intercepted over the wire been communicated to a Federal prosecutor, I would say that there had been some interception of defense communications. There were discussions about whether or not there should be a jury trial or a non-jury trial, for instance. There were also discussions --

THE COURT: Can't it be set forth? If you are prepared to concede that, why can't you set forth precisely what they are?

MR. PEDOWITZ: I don't think there would be much of a problem with that, your Honor, frankly. I would be happy to have Mr. Dershowitz tell me which interceptions he thought were most egregious and have you listen to them.

THE COURT: That is what I have asked everybody to do, but the things that aren't tendered the Court won't consider.

MR. DERSHOWITZ: Since this would appear to be an agreement that covered in these tapes are discussions of trial strategy, discussions of potential witnesses, documents that were being searched for at the trial, discussions of

evidence, discussions of whether Mr. Ostrer would take the stand, discussions of the private investigator, what he has turned up in the case, discussions of bail, discussions concerning the critical witness, Aubrey Moss, it would appear that it would not be necessary to go through the exercise of listening to the tapes.

THE COURT: I can't skip that. One of two things will happen. The Government will stipulate to the motion or the tapes will be played before the Court. If you think this man was unjustly treated, it is your duty to consent to an order granting a new trial or to an order granting a judgment of acquittal.

So either do that or come in and play the tapes.

MR. PEDOWITZ: Your Honor, I don't wish to appear to be stipulating to any violation of this man's rights by the Federal Government.

THE COURT: What did you just tell us?

MR. PEDOWITZ: Your Honor, I just told you there were interceptions by the State concerning these matters. They had absolutely no effect on the Federal trial, and we are prepared to show that.

The issue here, your Honor, is the question of whether or not the State interceptions had any effect on the Federal prosecutor's conduct of the trial.

MP [10]

THE COURT: Well, that's an issue of fact, isn't it?

MR. PEDOWITZ: It certainly is, your Honor.

THE COURT: And how am I supposed to decide such an issue of fact without hearing what the State intercepted? Because I can foresee it now. I am going to get a prosecutor who is going to come in and tell me, absolutely not, he was never told anything, and probably his counterpart from the State is going to come in and say, "Absolutely, I told him nothing," and unless you can establish it by circumstantial evidence from the tapes to the trial, unless you can put together a chain of proof, there is no way in which such a connection could be shown.

Isn't that so? Do you question that?

MR. DERSHOWITZ: No, no. I think that's right. The only question, your Honor, is really this: what we had thought we could do would be to have the witness on the stand, to elicit from him his answer that he received no communication, and then to play to him an excerpt, a brief excerpt from the tape and ask him, "Did you overhear that?" and ask him if he communicated that information.

THE COURT: Well, I don't suppose that is too unreasonable.

MR. PEDOWITZ: Your Honor, we would ask, however,

that at least one tape be played in full, and that seems to be the tape which concerns the matter which seems to have predominated the defense's viewpoint that the rights of Mr. Ostrer were violated, and that is the tape that involves Mr. Aubrey Moss's credibility and the possibility that he would be a Government witness. That has been the bone of contention so far, and we would like to have your Honor listen to that tape in full, particularly since there has been a clain of attorney-client privilege, and we think the conversations disclose at least the possibility, if not the high probability, that Mr. Ostrer and Mr. November, the attorney, were engaged in a possible obstruction of justice.

THE COURT: Well, all right. I am willing to permit counsel to try their case the way they want to try it. I just call your attention to the fact that the ultimate issue is going to depend, in my view, based on what little I know about it, on a chain of circumstantial proof.

I am extremely doubtful, in spite of what we read in the reports, that a Judge can listen to an experienced lawyer testify and just simply determine from his demeanor that he is lying. It's rare, but it can happen.

So I think the case is really going to depend on carrying the tapes all the way through, hearing the tapes all the way through, but you gentlemen can do it whatever way

you like

I take it Mr. Dershowitz intends to go forward in support of his motion. Is that the procedure here?

MR. DERSHOWITZ: Yes. What we would like to do is arrange for -- it is the policy of this court -- at least I have been so told -- that we aren't to subpoena people who work for the United States Government or who work for the state government.

THE COURT: If the witness isn't forthcoming, I would issue a subpoena on motion. I am sure you will be able to get the people.

MR. PEDOWITZ: Your Honor, I don't think there will be any problem. I have been in communication with these individuals. Mr. Maguire is employed privately, and Mr. Fine is employed by the State Department.

MR. DERSHOWITZ: Since the Government has indicated at least one tape that they would like to play in full, we would like an indication of what that tape is and what the footage is, so we can be prepared --

THE COURT: As a matter of courtesy, I think you should be able to give him that. He is asking what tape you intend to play. After we recess, you can give him that. That won't prevent you from playing other tapes.

MR. PEDOWITZ: Your Honor, there is one other

matter I would like to discuss with you. This may take a moment or two to develop, and I hope you will bear with me, but, your Honor, the basis of the claim is the conversations that Mr. Ostrer had that were overheard by the State, and there's no question about that. In addition, the conversations, as it turns out, were intercepted without probable cause. Although the State had a warrant, it turns out that the State judges have determined that there was insufficient probable cause to have the intercept.

As a result, a great deal of information landed in the hands of the State prosecutor. He subsequently had a meeting with Mr. Maguire, the Federal prosecutor in the case of Dioguardi and Ostrer.

It is our belief, and we intend to prove, that if Mr. Dershowitz doesn't call these witnesses for this purpose, absolutely nothing of what Mr. Maguire was told -- and he was told very little -- influenced his decision-making process in this particular trial.

The single contention is, I believe, is what Mr. Maguire was told, and I expect Mr. Ostrer's counsel will probably question him about precisely what he was told, but it is our information that the only information that Mr. Maguire was given was that Aubrey Moss, a potential witness in this trial, might be tampered with by the defense.

MP [14]

Mr. Maguire has, in an affidavit, already stated that he had already determined prior to the meeting with Mr. Fine of the State that he would not call Moss as a witness, and when he testifies he will tell your Honor he decided not to call Mr. Moss as a witness.

In addition, we are prepared to prove that he told a number of other people involved in this prosecution, prior to the meeting with Fine, that he did not intend to call Moss as a witness.

Now, your Honor, because we believe that the defendant suffered no prejudice as a result of anything which Mr. Maguire was told, we would like to bifurcate the hearing in a sense, and in a sense we would like to have the issue determined first whether as a result of the communications by the State to Mr. Maguire this defendant suffered any prejudice in his particular proceeding.

Now, I am willing to --

THE COURT: Bifurcate it from what?

MR. PEDOWITZ: Bifurcate it from the question of whether, if Mr. Moss was called as a witness and testified, it would have had any effect on the trial, which I think is a much more complicated issue and involves your Honor in the actual transcript of the proceeding, the trial of United States versus Dioguardi and Ostrer.

MP [15]

THE COURT: I don't know that that second element would ever come into issue if it could be established to the satisfaction of the Federal Court that the Federal prosecutor had gained information by these taps and had used them, had used the information in such a fashion as to prejudice the defendant's right to a fair trial.

By a fair trial in this context you mean an adversary trial, where nobody has a secret weapon.

I think that would be enough in most cases, and I don't think I would be called upon to go forward beyond that and say, well, even if he had blundered his way through and called Moss as a witness it wouldn't have made any difference, in view of the extent of the proof or whatever else -- I don't think that would be very relevant.

That is addressed to the interests of justice, and if the defendant was unfairly dealt with by taking the fruits of an illegal wire tap which interfered with his attorney-client privilege, I don't know that it would make much difference to say that if he hadn't had the fruits the outcome would still have been a conviction.

MR. PEDOWITZ: Your Honor, I most respectfully disagree with you that the nature of this new trial motion requires the defense to show that it would have had some effect on the jury, and we don't believe it would have had

any effect on the jury.

THE COURT: It's a question of unfairness.

MR. PEDOWITZ: Then I think it ought to be borne in mind th at this was an instance in which the State had wire tap orders which had been issued by a State judge. The State was, in its view, at that time lawfully wire tapping Mr. Ostrer. Then there was a meeting with Mr. Maguire at which very little of the information was turned over.

We submit in that instance it would make very little sense to deter the Federal Government by punishing it in this sort of instance. The Federal Government was doing nothing wrong. Indeed, it had no idea that there was a wire tap with Mr. Ostrer.

THE COURT: I think you have to stick with the first sentence in Rule 33 of the Federal Rules, but I am willing to bifurcate it if that is what you want. I am willing to take the testimony of the prosecutor in the fashion suggested by Mr. Dershowitz.

MR. PEDOWITZ: Your Honor, there is one matter -- and I don't want to lose this in the shuffle -- and that is in the bifurcation another matter that we would want to address, if your Honor feels that ultimately Mr. Maguire did something differently, is whether the defense had it in their

power to call Mr. Moss as a witness or have the Court call Mr. Moss as a witness and achieve precisely the same result --

THE COURT: Isn't it true that the only benefit was a tactical one? Moss was equally available to both sides. Isn't that so?

MR. PEDOWITZ: I believe that to be the case, your Honor.

THE COURT: I didn't try the case, but I understand from reading these motion papers that Moss was available. It is the contention of the movant that the Government obtained a benefit by receiving information wrongfully obtained which information impelled the prosecutor to change his tactics to the extent of not putting Moss on as part of the Government's direct case.

I think if you could really prove all of those things, you would be in really good shape on a Rule 33 motion.

So I don't know that we have to concern ourselves with the fact that the defendants could have called Moss or that the Court could have.

MR. PEDOWITZ: I think, your Honor, under a new trial motion, one of the standards is that the defense must diligently pursue the newly obtained evidence. If they haven't diligently performed their function, then they can't

complain later on that the evidence is suddenly --

THE COURT: Here the fellow went to trial, and he didn't know he was being tapped in his pre-trial preparations, tapped by the State. Isn't that the situation?

MR. PEDOWITZ: Well, there is some question as to whether he knew.

THE COURT: Well, anybody who knew wouldn't be foolish enough to talk with his attorney while that was going on.

MR. PEDOWITZ: There is no information that Mr. Ostrer knew that he was being wire tapped. The things that were discussed with Mr. November were with a bug as opposed to a tap on the phone.

THE COURT: All right. We will talk about a bug.

MR. DERSHOWITZ: Your Honor, the conversations were heard both on a big and a tap, so you hear one side on a bug and the other side on a tap.

THE COURT: It doesn't make much difference which it was.

MR. PEDOWITZ: No, but we do have some knowledge that Mr. Ostrer had some suspicion that he was being wire tapped.

THE COURT: What witnesses do you have?

MR. DERSHOWITZ: Assistant United States Attorney Maguire, assistant District Attorney Fine, Detective Maguire

and Detective Finley, who are the call recording or monitoring agents.

THE COURT: Why do we need them? We have the tapes, don't we?

MR. DERSHOWITZ: No. As I think your Honor will see, there are reasons for determining why the tapes were turned off at certain points and left on at certain points, and so whether any communication was had directly by Mr. Maguire and Mr. Fine, and we have some precedents for that, that if it is established that it is a threshold matter, that there were conversations overheard but not recorded, it is essential to have the chain of communication established on the record.

THE COURT: It is conceivable if they overheard them and didn't record them.

All right. When can we do this? I want to get it done.

MR PEDOWITZ: Your Honor, the only two people I haven't had an opportunity to talk to are Detective Maguire and Detective Finely.

THE COURT: Suppose I set a date, and if we don't finish it we will set it over.

MR. PEDOWITZ: Your Honor, there may be a number of short Government witnesses also.

MR. DERSHOWITZ: Your Honor, can we, again, just as a courtesy, get the names of potential Government witnesses?

THE COURT: At least you ought to tell us what they are going to testify to, because perhaps it can be stipulated for purposes of this hearing.

MR. PEDOWITZ: Your Honor, it's possible that we will call Mr. Schaeffer, Andrew Schaeffer, former assistant United States Attorney, and also Meyer Goldman, who is an SEC investigator, and the effect of their testimony, I believe, would be that Mr. Maguire had conversations with them prior to any meeting with Mr. Fine, at which he told them that he would not call Moss as a witness.

THE COURT: Could you begin at two o'clock on the 25th?

MR. DERSHOWITZ: February?

THE COURT: Yes.

MR. DERSHOWITZ: Your Honor, the 24th and 25th are the only two days that Mr. Silverglate and I are tied up in court, in Boston on another matter, but we could proceed on the 26th or 27th or the 1st of March. Any of those days. The 23rd.

THE COURT: If I can't do it on that day, it might have to go for a while. Do you suppose you could adjust your

Boston commitment?

MR. DERSHOWITZ: Your Honor, I have to tell you that that is a case in which I am a litigant. It is my divorce hearing, and it is a case in which Mr. Silverglate is representing me. I don't think I can. Any other case I could put off.

THE COURT: All right. March 1st at 9:45 a.m.

MR. DERSHOWITZ: Fine, your Honor.

MR. PEDOWITZ: Your Honor, there is one other matter.

THE COURT: If any kind of problem develops, let me know, because my schedule is very tight.

MR. PEDOWITZ: Your Honor, there is one other matter I would like to approach with you, and that is the question of how do we authenticate these particular tapes.

THE COURT: I thought that was all stipulated to.

MR. PEDOWITZ: And identify the voices on the tapes.

THE COURT: Can't that be stipulated to also, for purposes of this hearing?

MR. DERSHOWITZ: I think it can. I don't anticipate any problem. If there is a problem as to a particular voice, it can be identified presumably by Mr. Ostrer.

THE COURT: I gather, Mr. Dershowitz, that you have the burden of going forward on this matter, so you would have

to satisfy us that that is who the people were who were intercepted and whose voices were on the tape. Do you disagree with that?

MR. DERSHOWITZ: No. I think we have the burden of establishing it.

MR. PEDOWITZ: Your Honor, it is conceivable that a problem may arise.

THE COURT: You ought to make transcripts of the essential parts.

MR. DERSHOWITZ: We will check those with the Government for accuracy before this occurs.

THE COURT: Perhaps you could agree with each other, [illegible]h to do half, citing the sections you are relying on. Can you do that? If not, you ought to make some practicable division of it.

Is there anything further?

Now, Mrs. Oberman, you are going to be here in that hearing also?

MS. OBERMAN: Either Mr. Goldberg or myself.

MR. PEDOWITZ: Your Honor, I don't know exactly what Mr. Dioguardi's standing is to participate in this particular hearing. Is it his contention that his phone was tapped or that he was a party to the conversations that involved trial strategy?

Mp [23]

THE COURT: I don't know that Mr. Goldberg's motion papers made any reference to that.

MR. PEDOWITZ: Your Honor, I am afraid I haven't even seen the motion papers.

THE COURT: Well, I think your point is well taken, that Mr. Goldberg's motion is limited to the other issue that we took up.

MR. PEDOWITZ: Is that the juror, your Honor?

THE COURT: Yes. I think that's right. Your motion, Mrs. Oberman, is limited to that other issue, on its face.

MS. OBERMAN: Your Honor, I am here really as an accommodation to Mr. Goldberg.

THE COURT: I understand.

MS. OBERMAN: He could not attend today.

Before I make any sort of commitment, one way or the other --

THE COURT: You don't have to make any commitment. Just report to Mr. Goldberg that the Court understands his motion paper on its face to be limited to the question of the jury, and you can also tell him that the Government questioned his standing on the point, and the Court said nothing, because I am not going to say anything.

All right. If there is nothing further to be done

MP [24]

at this time, I will carry the matter over for all purposes until the 1st of March.

MR. DERSHOWITZ: Nothing further, your Honor.

THE COURT: I don't want any slip-ups, because I am running very tight on time and scheduling.

All right. Mr. Ostrer, you understand you are being continued on bail until March 1st.

DEFENDANT OSTRER: Yes, sir.

THE COURT: And you are to be here at that time. Probably we will be upstairs, on the sixth floor, but wherever I am, that is where you are to be.

All right. Good afternoon, Mrs. Oberman and gentlemen.

(Adjourned to March 1, 1976, at 9:30 a.m.)

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UNITED STATE DISTRICT COURT
SOUTHERN DIS RICT OF NEW YORK
- - - - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA

:

vs 71 Cr 558

:

LOUIS OSTRER,

:

Defendant.

- - - - - - - - - - - - - - - - - - - x

Before: HON. CHARLES L. BRIEANT, JR.,

District Judge.

New York, N. Y.
March 1, 1976
10:00 a.m.

Appearances:

PAUL J. CURRAN, United States Attorney for the Southern District of New York;
LAWRENCE PEDOWITZ, Asst. U. S. Atty.,
-and- EUGENE G. ANGUILLA, Esq., S.E.C.

ALAN ERSHOWITZ, Esq.,
HARVE SILVERGLATE, Esq.,
and
ANN GREENBLATT, ESQ.
Attorneys for Defendant.

- - -

THE CLERK: United States of America versus Louis Ostrer.

MR. PEDOWITZ: Ready for the government.

MR. DERSHOWITZ: Ready for the defendant.

MR. PEDOWITZ: Your Honor, there are a number of preliminary matters which should be very brief.

THE COURT: Have we taken care of the witnesses?

MR. DERSHOWITZ: Yes, your Honor, with one exception. I wanted to indicate to your Honor that we have with us Mr. Scott Robinson who is an expert on tape recordings from the firm of Bolt, Boranick and Brown, the firm that was consulted on the so-called Nixon tapes and we would like him to sit in the courtroom to consult with us on tape matters.

THE COURT: He is not going to testify.

MR. DERSHOWITZ: We have no current intention to call him to testify, but it is possible that we might call him to testify precisely on what he heard in the courtroom and it would be the purpose of his testimony to testify about that.

THE COURT: I certainly won't let him testify as to what he heard in the courtroom. My ears are as good as his.

MR. DERSHOWITZ: That's not what I mean, testify

about what he heard in the courtroom; for example, if there were any expert contradiction of what a monitoring agent had testified to concerning the way in which tape recordings were made or that kind of matter.

THE COURT: I won't do it. He is either going to testify and be a witness as to something he has done before he came here this morning or I am not going to take it.

If you want him as a witness you can exclude him. If you need him as an expert to consult with you, of course you may have him here.

MR. DERSHOWITZ: May we have a moment on that, if your Honor please?

THE COURT: Certainly. I think it is very doubtful that there would be anything for him to testify to.

MR DERSHOWITZ: That's true, your Honor.

THE COURT: I think he should stay. If there is an emergency or some unforeseen condition, I think we can better talk then.

MR. DERSHOWITZ: All right.

THE COURT: What other preliminary matters are there?

MR. PEDOWITZ: First of all, there is a very --

THE COURT: None of these people are witnesses

who are seated here? Are there any witnesses?

MR. DERSHOWITZ: No.

MR. PEDOWITZ: The only possibility is Mr. Ostrer, your Honor.

THE COURT: He is a party and he is entitled to stay.

All right, go ahead, Mr. Pedowitz.

MR. PEDOWITZ: Your Honor, a very recent Second Circuit opinion, United States versus Vincent M. Sapare, I have a copy of it and I just bring it to the Court's attention.

THE COURT: You can hand it to the clerk. What does it say?

MR. PEDOWITZ: Your Honor, it discusses a situation in which two federal agencies were simultaneously investigating a Mr. Sapare. Precautions were taken that certain wiretaps by the Justice Department not be disclosed to the IRS.

THE COURT: I remember this one, but it is a question of fact, isn't it?

MR. PEDOWITZ: That's correct, your Honor, We just bring it to the Court's attention for the legal standard.

THE COURT: Thank you.

jk [5]

MR. PEDOWITZ: Secondly, your Honor, I have prepared this morning a very brief chronology of what has happened in this case.

Now, I do not represent to the Court that this is all that has happened. Indeed, there are a great number of things which happened in addition to those listed on this chronology, but I think it may be helpful to the Court just to have a very basic outline of what happened and I supplied a copy of this to Mr. Dershowitz this morning.

THE COURT: Mark it for identification.

(Government's Exhibit U marked for identification.)

THE COURT: Has this been shown to Mr. Dershowitz?

MR. DERSHOWITZ: Yes, and I have no objection for its limited purpose of outlining the chronology.

THE COURT: For purposes of this particular hearing, these dates are agreed to be correct?

MR. DERSHOWITZ: No, your Honor. There are some dates on there that we do not know of our own personal knowledge and we would like to establish them through testimony. We have no reason to disagree with them, but some of them just were shown to us this morning and we can't stipulate to their accuracy.

THE COURT: Before I close the hearing, you tell me which ones you don't agree with.

MR. DERSHOWITZ: Yes, sir.

THE COURT: Go ahead, sir.

MR. DERSHOWITZ: We would like to call as our first witness Detective Finley.

(Government's Exhibit U received in evidence.)

W A L T E R F I N L E Y, called as a witness by the defendant, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DERSHOWITZ:

Q Could you tell the Court what your current occupation is?

A Police officer.

Q Where are you assigned currently?

THE COURT: Does it matter? He is with the New York City Police Department.

Let's get right down to the guts of this case.

Q Did there come a time when you were assigned to be involved in surveillance operations on a Mr. Louis Ostrer?

A Yes, sir.

Q Can you tell the Court approximately when that was?

A Approximately in October of 1972.

Q Can you tell us what your instructions were?

A Pertaining to what?

Q To the monitoring of conversations.

A To overhear and record telephonic and evesdropping conversations.

Q Were you in any way involved in the installation of the so-called bug or of the so-called wiretap?

THE COURT: You were hearing both wiretap and a bug?

THE WITNESS: Yes, sir.

Q Were you involved in the installation of either the wiretap or the bug?

A Partially, yes.

Q Can you explain?

MR. PEDOWITZ: Objection, your Honor. I don't see the relevancy of it.

THE COURT: I assume for purposes of this hearing the installation was unlawful.

MR. DERSHOWITZ: Yes.

THE COURT: I suppose it is proper for the Court to know what sort of bug was installed and where it was placed. You have already agreed, I take it, to the period of time during which it was operable. I will permit him to answer where and how the bug was installed.

A As to the location of the bug, I really don't have any knowledge as to that.

THE COURT: What did you have to do with installing the bug?

THE WITNESS: I picked the locks to gain entry to the premises.

Q Can you describe to the Court the monitoring set-up that you participated in; where you were sitting and overhearing the conversations; how the set-up worked out?

A Where the plant was located?

Q I take it by plant you mean where you and the other monitoring agents were sitting while the conversations were occurring?

A That was in a basement storeroom.

THE COURT: In the same building?

THE WITNESS: No, sir.

Q Can you simply describe to us the set-up. How many people were there? Was there a desk? Was there a microphone? Were you able to hear conversation and the relation between the microphone and the tape recorder.

A The microphone was not in the room where there was a tape recorder.

Q I'm sorry, you had a source by which you could hear, did you not, the conversation?

A Yes, sir.

Q And there was also a tape recorder?

A Yes, sir.

Q At the same time there was a bug operating and a wire tap operating, is that right?

A Yes.

THE COURT: We know that already. Let's get right down to the nub of it.

Q Were both of those operating at the same time so that you had for example two speakers that you would hear conversation coming through on?

A To be exact there were three.

Q Three. Now, what were the sources of the three speakers?

A I don't understand your question.

Q Was one a bug and two on different telephones?

A Yes. One was a bug and the other two were telephones.

THE COURT: Two separate telephone numbers?

THE WITNESS: I believe there were four phone numbers involved, your Honor. Two phone numbers came into one tape recorder. The other two phone numbers came into the other tape recorder and the bug or eavesdropping device was on the third recorder.

Q Did you hear all of the conversation that came over the speaker when you were in the room?

A Not necessarily, not.

Q Would you describe under what circumstances you did not hear what came over the speaker?

A Well, if you were monitoring for one recorder and the other recorder was working you would place a set of ear-phones on to remove that sound from you hearing so that you could concentrate on the particular machine that you were operating at that time.

Q So on occasion I take it, then, matter was recorded you yourself didn't hear?

A At that particular time, yes.

Q And was there matter that was heard by you that was not recorded?

A On occasion, yes.

THE COURT: What were the occasions for hearing material and not recording it?

THE WITNESS: If you were on one machine and another machine kicked off, the first portion of the conversation conceivably could have started prior to the time that you could have gotten from say machine A and walked over to machine B to turn it on.

THE COURT: What period of time would be involved?

THE WITNESS: Three, four seconds, five seconds.

THE COURT: That you missed the first five seconds—

THE WITNESS: Of actual recording time because at the time we were not permitted to use automatic recording devices which would start the machine automatically as soon as the conversation began or the phone would ring. Actually it was when the phone would ring.

Q Were there ever any conversations which you would begin to listen, to decide that you would not record them and then continue to listen to the conversations?

A No, sir.

Q Any time you decided that you did not want to record a conversation you immediately stopped listening to that conversation?

A That is correct, sir.

THE COURT: How did you do that?

THE WITNESS: Turned the machine off, sir.

THE COURT: You turned the speaker off?

THE WITNESS: Yes.

(Continued on page 12.)

Q How did you know when to begin the speaker again?

A Well, if it was on the phone, the dial recording or the dial impulse machine would incidate a hang-up by kicking off, knocking out one point on the paper. From that point on, it would be a new conversation that would be coming in.

Q Were there any conversations on the phone that you listened to, decided not to record and then picked up again in the middle of the same phone conversation?

A That was possible.

Q How did you decide to do that?

A If the person that was calling was part of the investigation and at the outset of the conversation if it was not relevant, the machine would be turned off, the volume would be turned down, the recorder stopped, not recording.

Subsequently, periodically, we would monitor it by turning the machine back on, and then, if the conversation was still of a social nature or a non-relevant nature, the machine would then be again turned off.

Q When you turned the machine on for those short bursts of conversation, did you also turn the recording machine on?

A I would say yes.

Q Were there any times that you can recall where you turned the monitoring machine back on, that is, your hearing device back on, but you did not turn the recording machine back on?

A Not to my knowledge; no, sir.

Q Now, you used the word "relevant" in your previous testimony. Who instructed you as to what was relevant to be overheard and to be recorded?

A At that time it was an assistant District Attorney, John Fine.

Q Did you have any written instructions as to what was relevant?

A Well, naturally, the court order would instruct you as to who was covered by the court order and what you were allowed to listen to.

Q Did you have copies of the court order in front of you when you conducted this wire tapping?

A Yes, sir.

Q Did you also have any memoranda written by Mr. Fine or by any other assistant District Attorney, instructing you as to the meaning of the court order?

A No, sir.

Q Any other written directions that you recall?

A No, sir.

Q Did you have any oral directions that you recall?

A Just a briefing of the court order itself.

Q Could you describe to us as best you can -- we know it's a long time ago -- what the briefing was in terms of the Court order on the Ostrer wire tapping?

MR. PEDOWITZ: Objection to this whole line of questioning.

THE COURT: I can't rule on the whole line of questioning at this point, but I think it has been stipulated that this was an unlawful intrusion into the pricacy of the people being bugged or tapped, so I don't think it is relevant what instructions he received but what he heard that counts.

MR. PEDOWITZ: And what was turned over to the Federal Government, your Honor.

THE COURT: Yes. I understand that.

Q Can you tell us whether at the time you were listening and recording conversations you took notes of those conversations by hand?

A No, sir; no notes.

THE COURT: You mean, you can't tell him?

THE WITNESS: No. No notes, sir.

THE COURT: He didn't ask you that. He asked you

whether you can tell him.

Now, either you can tell him or you can't tell him.

All right. Let's go on to something else.

Q Your testimony here is that you never took any handwritten notes at all; you made no handwritten notations while you were listening or recording conversations?

MR. PEDOWITZ: Your Honor, I object to the form, because of the word "notes", which is ambiguous.

THE COURT: Yes. Sustained.

Q Did you take any handwritten notes of any kind at the time when you were listening or recording conversations on the Ostrer tap?

MR. PEDOWITZ: Objection to the word "notes", your Honor. It is ambiguous.

THE COURT: I don't think it is ambiguous. If he doesn't understand the question, he will tell us.

(To the witness:) Answer the question. You did or you did not.

A The only notes that were taken was a transcription of the conversation that was recorded.

Q That is precisely what I am asking you about. So you did take --

A But this was not done at the time the recording

was being made. This was done subsequently to the recording.

THE COURT: Didn't you keep a log?

THE WITNESS: No, sir. The log is our plant reports, which would indicate just incoming times and outgoing times.

Q That is what I am asking you about. Did you not by hand note down incoming times, outgoing times and the persons who made the call and received the call?

A No. What we would do would be the time that the call came in -- this was while the recording was going on. Whether it was an incoming call or an outgoing call, what time the call came in and the lines that it rang.

Q How did they get transcribed?

A How did what get transcribed?

Q Did you write those down by hand?

A Yes.

Q Do you have copies of those notes? We have not had them produced.

A Those are the plant reports.

Q No. I am talking now about little cards that you might have taken notes on of the incoming call, where it came from and who was on it at the very moment that the call came in. Contemporaneous notes.

A No, sir.

A No, sir.

Q There were no such notes?

A No, sir.

Q The only notes that you took were taken afterwards, when you listened to the tape recordings and then made notes from the tape recordings?

A Yes, sir.

Q How did you determine the time when you took the latter notes which indicated in the margin time of call coming in? Did you remember them?

A I just explained to you, Counselor, that while the call was coming in, the time would be noted when the machine started, the line number of the tape, and then the time when the machine was turned off.

THE COURT: Is that all you wrote down?

THE WITNESS: Yes, sir.

Q You wrote that down in hand, in pencil or pen, on various cards?

A On paper.

Q On paper?

A Yes, sir.

THE COURT: Please don't repeat all his answers. There is no jury here, and it is a waste of time.

Q How soon after overhearing and recording the

conversation did you make what you called plant logs?

A Well, it varied. It varied with how busy the plant was at that particular time. Conceivably, you could have done it immediately after the conversation had taken place, or it could have been done after office hours, when they would go home, and we would stay there and do the transcriptions. If the conversation was not overly important, it would be synopsized. If it were very important, it would be transcribed in detail.

Q Is it fair to say that you generally did them either on the day that the conversation occurred, that evening or perhaps a day or two later?

A Yes.

Q Were there any circumstances in which you did them, say, a week later or two weeks later?

A Possibly, yes.

Q Could you recall in this particular tap whether any transcriptions occurred as much as a week later?

A Offhand, I really can't recall. I would say probably yes, but I can't recall a specific incident when that did occur.

Q Were there any occasions in which you took or synopsized, as you call the short transcription, and then were instructed by your supervisors to make a longer

transcription of it?

A Oh, yes.

THE COURT: He means on this particular case.

Q In this case.

A Yes, sir.

Q Do you recall which conversations that might have related to?

A Not really, no.

Q Did you receive any specific instructions as to the special treatment of lawyer-client conversations?

MR. PEDOWITZ: Objection, your Honor. I think it is irrelevant as to whether or not he received any instructions.

THE COURT: I will permit him to answer it yes or no.

A Yes, sir.

Q Can you relate what those instructions were?

MR. PEDOWITZ: Objection, your Honor.

THE COURT: Overruled.

A If you had to regard the client-attorney relationship.

Q In what way? Were you instructed to turn off the machine as soon as you heard any conversation between a lawyer and a client?

[20]

A Not a lawyer. Not any lawyer, no, sir.

Q Were you told the names of specific lawyers?

A In what respect?

Q Were you ever given the names of specific lawyers and told that if you hear the voice of this lawyer the machine goes off?

A Not to my knowledge, no.

THE COURT: What were you told with respect to lawyers, to attorneys telephoning?

THE WITNESS: That if it appeared -- at the outset of the investigation, many of the subjects that dealt with Mr. Ostrer were new to us. If it appeared that the conversation perhaps on the surface or in the beginning appeared to be relevant to our investigation but subsequently it was determined that actually he was defending Mr. Ostrer in a particular court action, then the conversation would be terminated at that point.

Q Were you ever told that a Mr. Julius November was a lawyer defending Mr. Ostrer?

A No, sir.

Q Did you ever hear conversations between Mr. Julius November and Mr. Ostrer?

A Yes, sir.

Q Did you realize when you heard those conversa-

tions that Mr. November was a lawyer?

A Not at the outset, no.

Q Did there come a time when you did realize there was a lawyer?

A Yes.

Q Did you seek direction from your supervisor as to how to treat conversations between the lawyer, Mr. November, and Mr. Ostrer?

A Yes, sir.

Q Which supervisor did you seek directions from?

A Assistant District Attorney John Fine.

Q What instructions did he give you?

A He amended the court order to include Mr. November.

Q He amended the court order to include --

A Because of the conversations that we had recorded pertaining to money being loaned.

Q Is it your testimony that he sought an amended court order from a judge including conversations with Mr. November?

A He not only sought it; he got it.

Q He received a court order?

A Yes, sir.

Q Do you remember when that court order was obtained?

MR. PEDOWITZ: Your Honor, I have the court order.

THE COURT: Let's state it for the record.

MR. DERSHOWITZ: We don't have that court order, so I would like to see it.

THE COURT: Let's have the date of it stated for the record.

MR. PEDOWITZ: It's December 22nd, your Honor.

MR. DERSHOWITZ: May we see it?

MR. PEDOWITZ: Sure.

THECOURT: Don't they have to give a copy of this to Mr. Ostrer in the State Court system?

MR. DERSHOWITZ: We got the original court order, but we did not get the amended court order.

MR. PEDOWITZ: I believe Mr. Campriello turned over all the court orders except the one which I have an original copy of this morning, your Honor.

MR. DERSHOWITZ: That may be fifteen minutes ago, and if it is --

THE COURT: Even so, it should be turned over now.

MR. PEDOWITZ: Your Honor, for the record I have pre-marked this as Government's Exhibit C.

THE COURT: All right. Exhibit C for identification?

[23]

MR. PEDOWITZ: The order was signed by --

THE COURT: If it is marked, you don't have to waste time describing it.

Q It is your testimony, then, that between the time that the original tap was installed and the date of the amended order of December 22, 1972, you were under instruction not to record lawyer-client conversations?

MR. PEDOWITZ: Objection, your Honor. That is not his testimony.

THE COURT: That is not his testimony, and it is unnecessary recapitulation. I heard his testimony.

Go on to something else.

Q Did there come a time when you noted in the margins of your plant log that certain conversations relating to subject matters which you then described in short form were not recorded. Do you recall that form of notation?

A Yes.

Q Could you describe to us how you knew what the subject matter of the conversation was without listening to the conversation?

A I just explained that, Counselor. If you are operating one machine and another machine srarts, you can hear a portion of the conversation as it begins.

[24]

Now, naturally, if what the person on the phone says is relevant, just because we did not record it at that particular instant, it is noted on the plant report that that portion of the conversation was overheard without being recorded but that subsequently the machine was then turned on to continue recording, actually recording the remainder of the conversation.

Q Were there any conversations in which you wrote an instruction indicating "Not Recorded", in which you did not record any part of the conversation but then summarized the conversation in the log?

THE COURT: Aren't these logs available?

MR. PEDOWITZ: Yes, your Honor; they are. I have supplied copies to Mr. Dershowitz.

THE COURT: They speak for themselves. If you want to offer them in evidence, please do so. If you want to ask him about a particular conversation, please do so, but don't waste time.

MR. DERSHOWITZ: I think we should offer the original of the logs, which are in Mr. Pedowitz's possession, and we would like to have them identified initially.

THE COURT: If genuineness is not in dispute, don't waste time.

MR. PEDOWITZ: I have no dispute about the

genuineness.

THE COURT: Do you dispute the genuineness, Mr. Dershowitz?

MR. DERSHOWITZ: No.

THE COURT: All right. Let's go. Which exhibit is it?

MR. PEDOWITZ: Your Honor, we will mark it as a defense exhibit.

THE COURT: You don't mind if they are marked as a defense exhibit, do you?

MR. DERSHOWITZ: No.

THE COURT: A number have been removed and attached separately, but I will include them later so as not to cause any concusion.

Have you seen them all, Mr. Dershowitz?

MR. DERSHOWITZ: Yes. We have seen all of those turned over to us, which I assume were all of them.

THE COURT: And you state that is all there are?

MR. PEDOWITZ: That's all there are, your Honor, that were turned over to me by the State officers.

THE COURT: Is there any reason to believe they have more, that were not turned over?

MR. PEDOWITZ: I have no reason to believe that there were not more. I have been told this is it.

(Government's Exhibit V-1 through V-5 marked for identification.)

Q Detective Finley, was there ever a situation, to your knowledge, where you re-recorded over tape t hat had previously been recorded?

THE COURT: In this case?

Q (Continuing) In this case.

A Absolutely not.

Q That would be regarded as absolutely improper, would it not, to re-record, and in violation of your orders?

A Yes, sir.

Q Can you describe to us what it means in the logs to say that the plant was opened at a certain time?

MR. PEDOWITZ: I object to this. I don't see the relevance of it. The question is, what was overheard?

THE COURT: I will allow it, but it must be self evident that when the plant is opened there are people on duty, and when it is closed there is no one on duty.

(To the witness:) Isn't that what it means?

THE WITNESS: Yes, your Honor.

THE COURT: Don t we know that?

THE WITNESS: Except it could conceivably be that when the plant is closed we will close the plant down on

paper, because the subjects we are investigating would have left, but that does not mean we would have left the premises. We would be there transcribing conversations that had taken place that day.

THE COURT: In other words, it means whether you are operating or not operating?

THE WITNESS: Yes, sir.

Q Approximately how many people operated a plant at a given time?

A On this particular plant?

Q In this case; yes.

A The majority of times, it was two.

Q There were three speakers, so that two operators would be assigned to listen to three input sources; isn't that right?

A Yes, sir.

THE COURT: You worked a full shift, or did you work only whenever they were open, or what was your time schedule?

THE WITNESS: Well, at that time we worked whenever they were working.

Q May I show you one notation from a log and ask you perhaps to explain it?

MR. PEDOWITZ: Your Honor, could we have it

marked, please?

THE COURT: Yes.

MR. DERSHOWITZ: We will have it marked as Movant Exnibit 1.

(Movant Exhibit 1 marked for identification.)

MR. PEDOWITZ: Your Honor, if the witness is going to be asked specifically what is on there, I would like to see it first.

THE COURT: Haven't you seen all these?

MR. PEDOWITZ: I expect I have, but I don't know specifically what he is showing. There are thousands of pages.

THE COURT: All right. Look at it quickly.

(Pause.)

Q Would you look at the conversation which appears under the footage, or whatever it is, 1155, which has an incoming call from a Mr. Barry Mayham.

MR. PEDOWITZ: Your Honor, objection. There is no foundation laid that this particular officer recorded that conversation or that he transcribed it.

THE COURT: He can readily tell us that. Ask him what the word means, and if he doesn't know, he will tell you that he doesn't know.

THE WITNESS: May I see this report?

THE COURT: What is the question?

MR. DERSHOWITZ: The question is whether he can explain to the Court that there is a relatively lengthy description of the conversation, followed by the initials NR, which I take it mean "Not Recorded".

Q Is that right?

A I have no idea. I did not take that conversation.

MR. DERSHOWITZ: I am trying to save time, your Honor, by asking him about conversations so we don't have to call all the other officers.

MR. PEDOWITZ: Your Honor, the initials NR might be ambiguous. I have no idea what it means, but NR doesn't inherently mean "Nor Recorded".

THE COURT: Does it mean "Not Recorded"?

THE WITNESS: I have no idea how this officer recorded this. This is Detective Brennan.

THE COURT: Is there anything on that sheet that pertains to you?

THE WITNESS: No, sir.

Q Did you use the initials NR in your logs?

A Occasionally, yes.

THE COURT: What does it mean?

THE WITNESS: "Not Relevant".

Q Did you have a code for "Not Recorded"?

A Not recorded.

Q You would write not "Not Recorded" and write out "Not Relevant"?

THE COURT: Do you understand his question?

THE WITNESS: Yes; I understand his question, your Honor.

MR. DERSHOWITZ: We have no further questions of this witness, your Honor.

THE COURT: I think you have an open question.

MR. DERSHOWITZ: I am sorry. Could the reporter repeat the question?

THE COURT: Perhaps I might reframe it.

(To the witness.) How did you make an entry to show "Not Relevant" and how did you make an entry to show "Not Recorded"? What practice did you use?

THE WITNESS: As I use, I would write "Not Rec" for "Not Recorded" and NR for "Not Relative".

THE COURT: You mean "Not Relevant"?

THE WITNESS: "Not Relevant" or possibly "Not Rel". There are various -- it depends on how busy you are.

Q Why did you need two codes? Wasn't everything that was not relevant not recorded and everything that was not recorded not relevant?

MR. PEDOWITZ: Objection, your Honor.

THE COURT: I think the answer is self evident, but I will let the witness answer.

THE WITNESS: Would you repeat your question, please.

THE COURT: Frame it again, please.

Q Was there any difference between something not relevant and something being not recorded? Wasn't everything that was not relevant not recorded?

A No. You would put an indication -- if you had an incoming call and the beginning of the conversation was not relative, you would put "Not Relative" and "Not Recorded".

THE COURT: When you say "Not Relative" you mean "Not relevant"?

THE WITNESS: Not reelvant to the investigation and not recorded from that point on. The first portion of the conversation would be recorded.

THE COURT: Until you reached a value judgment as to whether it was relevant?

THE WITNESS: Yes, sir, at which time the machine was turned off, so you then would have two notations made.

MR. DERSHOWITZ: No further questions of this witness.

THE COURT: Do you have any cross-examination?

MR. PEDOWITZ: Yes; I do, your Honor.

To save time, I am going to treat him as my witness. In some respects I may be going beyond the scope of direct examination.

THE COURT: All right. There is no jury here, and there is no reason why you can't do that.

MR. PEDOWITZ: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. PEDOWITZ:

Q Detective Finley, during 1972 and 1973, while you were participating in an investigation of Louis Ostrer, was the Federal Government to your knowledge a participant in the investigation?

THE COURT: Is it contended they were?

MR. PEDOWITZ: I don't know, your Honor.

THE COURT: I haven't heard or seen anything in the papers which contends they were.

Do you contend they were, Mr. Dershowitz?

MR. DERSHOWITZ: We have no information currently that they were. We would be happy to have the witness answer that question, since it was asked of him.

THE COURT: He can answer it, but don't you think you have to prove a negative?

Q Sir, was the Federal Government a participant in

this investigation?

A No, sir. This was strictly a police department, New York County Districe Attorney's office investigation.

THE COURT: At any time, were you in contact with any Federal people in connection with this case?

THE WITNESS: No, sir. Myself personally, no, sir. I do not recall ever being in contact with them.

Q Sir, when did you first meet me?

A A week before last.

Q Excepting myself, have you communicated any information regarding these taps to any Federal officer?

A No, sir.

Q At any time?

A No, sir.

Q Now, sir, who were the people who had access to the information overheard on these particular taps, access to the plant reports and access to the tapes themselves?

THE COURT: Why don't you limit your question up until January 26, 1973?

MR. PEDOWITZ: Fine, your Honor.

THE COURT: During the period from the time the taps began, the bugging began, through January 26, 1973, who besides yourself?

THE WITNESS: The officers that were assigned to

the investigation, the supervising sergeant and the assistant District Attorney.

Q Is it possible also that the commanding officers of the squad that you were working with might also have had access?

A Conceivably, yes.

Q Anybody else?

A Not to my knowledge, no.

THE COURT: Do we have names for these people?

MR. DERSHOWITZ: Detective Finley can offer them, your Honor. I have a list of them.

THE COURT: Do you have a list?

MR. PEDOWITZ: I do.

THE COURT: Show him the list and ask him if there is anybody who is not on the list.

THE COURT: What is the number of the list?

MR. PEDOWITZ: Your Honor, I hadn't marked this myself. I had not intended to use it.

THE COURT: You see, it is meaningless to me when he tells me the officers are assigned and the supervising sergeant and the assistant District Attorney. I assume he means Mr. Fine, but he doesn't say so. And possibly the commanding officer of the squad.

MR. PEDOWITZ: I understand that, and Mr.

Dershowitz has subpoenaed each and every one of them, and they are here to be called or available to be called.

(Government Exhibit W marked for identification.)

Q Sir, to your knowledge, would this be an accurate list of those people who had access to the information, excluding John Maguire, going down the list, John Fine, Alfred Scotti, Inspector Paul Vetrano, Detective Gleason, assistant District Attorney Austin Campriello, Police Officer Maguire, Detective Finley -- yourself - Detective O'Rourke, Detective Brennan, Sergeant Barabedian, Detective Collins, Detective Brech, Detective DeCastoli, Detective Johnson, Detective J. Hoffman, Detective Ray McCarthy, Detective John O'Donnell and Detective Dominic Rozzano?

A Would you like me to go down the list for each of the names? These three officers here, Detective DeCastoli and Detective Brech and Detective Johnson, did not man the plant. They were only involved in the installation of the plant, so therefore they would not be privy to any of the information that was obtained.

THE COURT: Who are these three?

THE WITNESS: Detective DeCastoli, Police Officer Brech and Detective Johnson. Detective Hoffman was the photographer assigned to the investigation.

I believe there may have been one or two times

when he was actually on the plant while any recordings were being done.

MR. PEDOWITZ: Your Honor, I offer Government Exhibit W.

THE COURT: It will be received in evidence.

(Government Exhibit W for identification was received in evidence.)

MR. PEDOWITZ: Your Honor, this had originally been a witness list so I crossed off the name Harold Maguire, who was the Federal prosecutor.

THE COURT: All right. The record will so indicate.

MR. PEDOWITZ: And also Mr. Silvio Mollo.

THE COURT: You man we won't have Silvio Mollo as a witness?

MR. PEDOWITZ: Mr. Dershowitz has subpoenaed him, your Honor.

Q Sir, was there any policy in your squad with regard to turning over information to any person outside of your squad, information that had been heard on a wire tap or through a bug?

A You mean to anyone outside of the D.A.'s squad or -- the D.A.'s squad in itself or the unit that was assigned to the investigation?

Q Both.

A It was a restricted matter to transmit to any outside agency, including our own Police Department, any information that we obtained during the course of a particular investigation. As far as the squad itself, there were approximately -- at that time I believe there were approximately seventy-two men assigned to our unit. That worked on the case were approximately fifteen. It was also a policy of our commanding officer at that time, Inspector Vetrano, that inspectors of that squad who were assigned to a particular investigation were to refrain from discussing the investigation with anyone not physically connected to it.

Q So in other words, sir, there was a squad of approximately seventy-two members, and then there were teams; is that correct?

A Yes, sir.

Q Sergeant Garabedian would have been in charge of your team; is that correct?

A Yes, sir.

Q The policy was not to transfer information outside of the team, even to squad members; is that correct?

A That is correct, sir.

Q This squad was associated with the Rackets Bureau of the District Attorney's office; is that correct?

A Yes, sir. At that time, we were assigned to work for the Rackets Bureau; yes.

Q Sir, did you observe that policy in this case?

A Yes, sir.

Q In December of 1972, do you recollect attending a meeting with Harold Maguire, the Federal prosecutor in the Ostrer matter, and John Fine, an assistant District Attorney?

A No, sir; I do not recall such a meeting.

Q Have you been told, sir, that there are notes that you did attend such a meeting?

A I was told there was an entry in a diary, I believe, by assistant District Attorney John Fine, that I was present, but I do not recall ever attenting this meeting.

Q Sir, would it be fair to say from your testimony, then, that to your knowledge the only persons who had access to the information received as a result of the electronic surveillance were the team members as well as District Attorneys -- or assistant District Attorneys Fine, Campriello and their superiors in the District Attorney's office?

A Yes; and my commanding officer.

Q And your commanding officer?

A Yes.

Q Sir, in connection with this case, did you overhear any conversations which led you to believe that Louis Ostrer and Julius November might be planning to tamper with a Federal witness by the name of Aubry Moss?

A Yes, sir; I did.

Q Do you recollect the date of that conversation?

A No, sir; not offhand. If I could view the plant report in question.

Q Sir, I am now showing you a plant report marked Government Exhibit L for identification, and I ask you, sir, if that refreshes your recollection as to the date of the conversation.

A Yes, sir. November 21, 1972.

Q You were on the plant on that date; is that correct?

A That's correct, sir.

Q Was this conversation overheard as a result of a bug being placed in Mr. Ostrer's office?

A Yes, sir.

Q And at the time, did you have a warrant which entitled you to place the bug in the office and listen to conversations?

A Yes.

MR. PEDOWITZ: Your Honor, I offer Government's

Exhibit L, which has already been received, as a Defense Exhibit, because that is one of the plant reports which I had marked separately.

THE COURT: Any evidence offered by either party will be received by the Court and considered on the entire case. I had a concession from Mr. Dershowitz that he didn't require that it be renumbered.

MR. PEDOWITZ: Fine, your Honor.

THE COURT: Which is perfectly all right with me.

MR. PEDOWITZ: Your Honor, I request permission at this point to distribute a transcript of this conversation and to play the recording of the conversation.

The relevancy of this, your Honor, is that Mr. Dershowitz and Mr. Ostrer have claimed in their affidavits that there was in fact no good-faith basis for listening to this conversation between Mr. November and Mr. Ostrer, because they believed there was no tampering going on. We would like to play the conversation so the Court can have an opportunity --

THE COURT: As I understand it, a large number of witnesses are standing by for this hearing, live witnesses who have other jobs and have a need to go back to work, and I don't know why I can't take the live witnesses and then permit the tape to be played later.

MR. PEDOWITZ: Your Honor, I would prefer, frankly, for the Court to get some idea of what this case is about, and this is maybe the only tape for which this is required.

MR. DERSHOWITZ: Your Honor, just to make that fully --

THE COURT: I am supposed to rule about whether that is a valid basis for interrupting a cross-examination.

MR. DERSHOWITZ: If Mr. Pedowitz plays that tape, we must insist on playing other tapes that took place within a few days, to put the entire matter in context. We have no preference as to the order, however.

THE COURT: I will hear the tape later. I want to finish with these live witnesses.

Be assured that I can remember, and I really think I do understand what this case is all about.

MR. PEDOWITZ: I understand, your Honor.

THE COURT: Come on. Let's move along.

MR. PEDOWITZ: I will request at a later point that the Court listen to Tape Number 3819, at footage 0437, for which a transcript has been prepared by the Government, Transcript T-3. It has been marked as a Government's Exhibit.

THE COURT: Let's move along.

BY MR. PEDOWITZ: (Continuing)

Q While you were eliciting the conversation which I have just referred to, were you under the view that you were listening in the preparation of and investigating of a crime?

A Yes, sir.

Q Sir, after hearing this conversation --

MR. PEDOWITZ: And, your Honor, I am going to characterize it in order to aid him in answer the question.

Q (Continuing) -- in which reference was made to a woman by the name of Susan Gold providing an affidacit about the sexual relations of Mr. Aubrey Moss to Mr. Ostrer and Mr. November as well as to the fact that Susan Gold wanted to be paid more money by Mr. Ostrer, did you later overhear a telephone conversation in which Susan Gold told Mr. Ostrer that her pay check was now bigger and that Moss had been calling Susan Gold and that Ostrer didn't want to talk to Moss because he might be "wired"?

A Yes, sir; I do recall that.

Q Do you recollect the date of that conversation, sir?

A No, sir; I don't.

Q Would your memory be refreshed if I showed you a plant report?

A Yes, sir.

Q Sir, I am showing you a plant report, which has been separately marked as Government's Exhibit M for identification, and I ask you, sir, if that refreshes your recollection as to the date of that conversation.

A Yes, sir. It was November 27, 1972.

Q And, sir, did you prepare a partial transcript with respect to that conversation?

A Yes, sir; I did.

Q Is that your plant report, in effect?

A Yes, sir.

MR. PEDOWITZ: Your Honor, we offer Government Exhibit M separately.

THE COURT: All right. It will be received and marked in evidence.

(Government Exhibit M for identification was received in evidence.)

MR. PEDOWITZ: Your Honor, at this time I would request, if we were not doing this in a different order, an opportunity to play Tape Number 3645 at footage 0665.

THE COURT: I will hear all the tapes that either of you reasonably and in good faith believe that I ought to hear.

MR. PEDOWITZ: Fine, your Honor.

THE COURT: I won't have any argument with counsel about listening to tapes. That is what I am here for. I just want to expedite this matter.

I will permit you to mark the transcript for identification. I am willing to look at the transcript while you are examining this man, but let's get the live witnesses on record here.

MR. PEDOWITZ: Very good, your Honor. The transcript which we prepared will be Government Exhibit T-7.

THE COURT: All right. Hand it to the clerk.

MR. PEDOWITZ: Your Honor, perhaps it will be helpful now if I handed you T-3 through 8, which are all Government transcripts.

THE COURT: Copies of these transcripts have been seen, have they, by defendants?

MR. DERSHOWITZ: We have seen copies of transcripts which I assume are all that they have. We do, however, in two or three important respects, have some dispute about words, which your Honor will resolve when the tape is heard.

THE COURT: The transcripts are not the best evidence of what is on the tapes, which is what we keep telling our juries. It is only an aid to read while they are

listening.

If there is something of moment to Mr. Finley's testimony, then I will permit you to call my attention to it now.

MR. PEDOWITZ: Your Honor, these have all been marked as T-1 through 8.

Your Honor, I have prepared additional copies; if it becomes necessary to have additional copies, I have them for you.

THE COURT: Please frame another question.

BY MR. PEDOWITZ: (Continuing)

Q Sir, during the course of your monitoring, did you overhear any conversations in addition to those already mentioned, in which Mr. Ostrer expressed concern about being wire tapped?

A Yes, sir.

Q Sir, do you recollect the specific dates of any of those conversations?

A No, sir.

Q I show you, sir, what has been marked as Government's Exhibit J for identification, another one of your plant reports. Sir, referring to the second page of that particular document, does that refresh your recollection as to one of the specific dates on which you heard con-

versations about Mr. Ostrer's concern about being wire tapped?

A Yes, sir. That's on November 13, 1972.

THE COURT: What is the relevancy of this?

MR. PEDOWITZ: Your Honor, that argument that Mr. Dershowitz is going to make is that the State's view of the potential tempering with Aubrey Moss was not warranted, that a number of conversations which were had after the date of the initial conversation indicated that in fact Mr. Ostrer had no desire to tamper with Mr. Moss.

We want to make it clear to the Court that Mr. Ostrer was constantly concerned about either Moss being wire tapped or his own phones or his office being bugged.

For that reason, your Honor, we are offering certain transcripts which indicate that Mr. Ostrer was making reference to the fact that he might be wired or bugged on a number of occasions.

MR. DERSHOWITZ: Your Honor, we think this is utterly irrelevant, especially in light of the fact that the question is November 13th, prior to all these conversations.

THE COURT: I understand. I was just asking what the purpose of this offer was. You would be surprised, those of you who see wire taps, how many times the person being tapped indicates that he knows he is being tapped, and

he goes right ahead and talks.

All right. Next question, please.

MR. PEDOWITZ: Your Honor, to cut this short, I am going to make reference to a number of transcripts which refer to conversations of this sort, just so that your Honor has a record of it.

THE COURT: Allright.

MR. PEDOWITZ: Your Honor, T-1 is a conversation which refers to the fact that Mr. Ostrer might in fact be concerned about being wire tapped.

T-4 is a transcript in which Mr. Ostrer indicates concern about Mr. Moss being wired. T-5 is a conversation between Mr. Ostrer, Philip Tartaglia and a Mr. Di Lorenzo, in which Mr. Ostrer expresses concern about his office being wired and the fact that he recently checked the phones and the office for bugs and for wire taps.

MR. DERSHOWITZ: I think to complete that thought, your Honor, the Government should represent that the sweep for bugs turned up no bugs at all, so that Mr. Ostrer, although he expressed concern, had reason at that point to think that there were no bugs in the office.

THE COURT: What was the date, again?

MR. PEDOWITZ: On that one, your Honor, I believe it is early December. It is December 5, 1972, your Honor.

These, by the way, are all conversations all overheard by Mr. Finley.

T-5 --

THE COURT: Won't you finish up with the witness first.

T-8 is a similar conversation about concern about Mr. Moss being wired.

MR. PEDOWITZ: I have no further questions, your Honor.

MR. DERSHOWITZ: I was very surprised to hear about --

THE COURT: No speeches like that. Just ask a question. If you are allowed to ask questions like that, you will embarrass youself terribly in a jury trial.

REDIRECT EXAMINATION

BY MR. DERSHOWITZ:

Q You mentioned something about a diary entry in John Fine's diary that was shown to you, indicating that you had attended a meeting.

A It was not shown to me. It was told to me that there was an entry. If this entry does in fact exist, I donot know for certain, because I have not seen it.

Q Who told you that there was such an entry?

MR. PEDOWITZ: I did, your Honor, if it is an

issue.

THE COURT: I know, but it is permissible cross-examination. He says, notwithstanding what he was told, he has no memory of being there.

Is that what you are saying?

THE WITNESS: Yes.

Q When were you told that such an entry existed?

A Friday. Friday just past.

Q Did you have occasion to check any notes, any diaries of your own that would indicate whether or not you attended such a meeting?

A No.

Q So you are relying on your unaided memory of several years ago?

A Yes.

Q I take it you have a great deal of experience in listening to wire taps and bugs other than in the Ostrer case?

A Yes, sir.

Q Is it not a common phenomenon that people being overheard in wire tapping and bugs will say, "My God. I hope I am not being wire tapped" or "Gee, I wonder if I am not being wire tapped"?

THE COURT: That's not what they say. They say.

"I believe this phone is bugged," and they then go right on talking.

I hear it in case after case. The Court will take judicial notice of it. The people will say, "I think I may be bugged," and then talk. Why they do it I don't know.

Let's go forward.

Q May I ask you whether this is your handwriting?

A The first portion is not, but from this point, where my initials appear on the column side here, yes.

Q Could you tell us, if you know whose handwriting this is by the initials?

A Police Officer Maguire.

MR. PEDOWITZ: Your Honor, the record is going to be barren of any reference to what particular document that is.

THE COURT: Yes. It has to be marked for identification.

MR. DERSHOWITZ: It turns out, since it was not his handwriting, we will not intend to pursue it.

THE COURT: Nothing is to be shown to the witness unless it has been marked for identification. I thought you had marked it.

MR. DERSHOWITZ: These are all part of the matters that have been marked. They are part of the logs.

THE COURT: If they are detached sheets, I can't identify those.

MR. DERSHOWITZ: We would like to mark all of those.

(Movant's Exhibits 2 through 3, inclusive, marked for identification.)

Q Could you identify this as to whether or not it is your handwriting?

MR. PEDOWITZ: Your Honor, could we have some reference to what it is that counsel is showing him?

THE COURT: Will you do that, please? Give him the number, anyway.

MR. PEDOWITZ: Also, the last one he showed him --

THE COURT: What is the number of the last one that the witness testified about?

THE CLERK: Exhibit 2 for identification.

Q Now you are looking at Exhibit 3?

A This is only a partial transcript of this conversation.

Q I am just simply asking you whether that is your handwriting.

THE COURT: Can't we have an agreement that wherever his initials appear it is his handwriting?

MR. DERSHOWITZ: In this case, there is no hand-

writing.

A I would say yes: it is.

Q At 1545, am I reading your writing correctly when it says, "Not Recorded. Ostrer to Susan. Ostrer tells Susan he is with Maguire. I am stuck in the Federal court" -- and what's this word?

A "House".

Q Does that reflect what is stated here?

A Yes, sir.

Q Is it correct to say that that conversation is not recorded?

A I would say yes.

Q And it is correct to say that that conversation was overheard?

A The first portion of it, yes.

Q Is there anything on this log that indicates that there was anything more to the conversation than what is reflected in your notes of it?

A I'm sorry. Would you repeat that?

Q You said that the first part of the conversation was overheard. Is there anything in these logs which indicates there was anything more to the conversation than what is reflected in your notes of it?

A Not reflected in the notes, no, but I'm not sure

whether there was or not.

Q You are not sure?

A No.

Q Is this your handwriting on Exhibit Number 4?

A No; it's not my handwriting; no.

Q Do you have any way of knowing from this whose handwriting it is?

A I would say that it's Police Officer Maguire's, although I couldn't be sure.

Q Now I refer to Exhibit 5 and ask you whether it is your handwriting.

A No; I don't believe it is. No. I believe that's, again, Police Officer Maguire. This is my handwriting (indicating) and this is mine (indicating).

Q So some of your handwriting does appear on this page?

A Yes, sir.

Q And does it not say at the top of the page "Detective Finley on plant"?

A Yes, sir.

Q Is that written in your handwriting?

A Yes, sir.

Q And this handwriting here is not the same as the handwriting here (indicating)?

A No; I don't believe so.

MR. DERSHOWITZ: One more exhibit, please.

(Movant's Exhibit 6 marked for identification.)

Q Could you indicate whether or not this is in your handwriting, sir?

A Yes, sir.

Q It is. Now --

A Yes, sir.

Q You will notice that there are two calls, and I believe they are calls between Moss and Suzie, about which you previously testified. One, "Suzie in office on phone with Moss at 10:57", and another, "Ostrer in office on phone with Moss".

In those two cases, is it correct to say that you did not log those conversations on this page?

A No, sir.

Q You did log those conversations on this page?

A What is this plant report from? Is this from the bug or the telephone? If it's from the bug, there will be no transcription on the bug of the telephone conversation, because it's a duplication of work on the telephone.

Q So your testimony, then, is that this is a bug log --

A If it's a fact, I do not know, Counselor.

Q Do you know from this?

A No. I would have to check the reel number and on the reel number box it would determine whether or not it is the bug conversation.

MR. PEDOWITZ: If Mr. Dershowitz is interested, I can certainly clear that up, your Honor.

THE COURT: Don't put gratuitous remarks like that on the record. Let's assume he is interested.

MR. PEDOWITZ: 3446 is one of the bug transcripts, your Honor, so this plant report relates to the bug.

Q So it is your testimony that we should find the complete -- or the transcription, the log of this conversation on the telephone tap plant logs?

A If the conversation was part of the investigation, yes.

THE COURT: You mean, if it was recorded?

THE WITNESS: Yes, sir.

Q You testified previously that you did not go to the meeting and you know of no communication about the contents of the taps to the Federal Government. Do you know of your own knowledge who did go to the meeting with United States Attorney Maguire?

A First of all, Counselor, I did not say I did not go. I said I did not recall ever attending such a meeting.

Q I'm sorry.

A The second portion of your conversation -- your question was in reference to --

Q Do you know whether or not --

THE COURT: Let the witness finish his answer, please.

MR. DERSHOWITZ: I thought he was asking me a question.

A Yes. What was the second part of your question?

Q Whether you, to your knowledge, know who attended the meeting.

THE COURT: If he says he doesn't recall attending it, it would be hard for him to know who did attend it to his knowledge. It seems to me it is a poorly phrased question.

Q May I simply ask for . yes or no?

THE COURT: It's ridiculous. The man says he does not recall attending the meeting, and he is asked to hiw knowledge if he knows who attended.

MR. DERSHOWITZ: He may not know whether he attended, but he might know who attended.

THE COURT: I don't see how that is possible to his knowledge.

(To the witness:) Do you understand the question?

THE WITNESS: I understand the question, but I feel my answer would be the same: I have no recollection being -- I do not recall being at the meeting, if the meeting ever took place.

Q Do you recall with whom you discussed the issue as to whether the Ostrer-November discussion which was related to you by Mr. Pedowitz constituted an obstruction of justice or blackmail?

THE COURT: I would like you to limit that question, if you will, to any time prior to January 26th, to and including January 26, 1973.

MR. PEDOWITZ: Your Honor, I object to the phrasing of the question, since I believe I was very careful to say "an attempt to obstruct justice". I don't believe I characterized it as an actual obstruction.

THE COURT: All right. Please rephrase the question with those two limitations.

Q With whom did you participate in discussions concerning any attempt to obstruct justice, alleged attempt to obstruct justice, between Mr. Ostrer and Mr. November?

THE COURT: On or prior to January 26, 1973.

A To the best of my recollection, it would have been Police Officer Maguire, who was my partner on this plant; Sergeant Carabedian, who was my immediate supervisor, and

assistant D. A. Jone Fine.

THE COURT: You spoke with all three of those individuals?

THE WITNESS: Yes, sir.

Q To your knowledge, did you participate in any further investigation other than by listening to tapes of any attempted alleged obstruction of justice involving Mr. Ostrer and Mr. November?

A No.

MR. DERSHOWITZ: No further questions of this witness, your Honor.

MR. PEDOWITZ: Your Honor, just one very quick question.

RECROSS-EXAMINATION

BY MR. PEDOWITZ:

Q Detective Finley, in connection with this attempted obstruction of justice, did you prepare an affidavit in support of an extension and amendment to the wire tap and bugging orders in the State Court?

A Yes, sir; I did.

Q Is that the document marked as Government Exhibit C?

MR. DERSHOWITZ: Excuse me. May I inquire as to whether that was turned over to us?

MR. PEDOWITZ: Mr. Dershowitz had it in his hand ten or fifteen minutes ago.

MR. DERSHOWITZ: This is the document that was turned over to us by Mr. Campriello?

MR. PEDOWITZ: No. I gave it to you a few minutes ago. You had it on the podium.

MR. DERSHOWITZ: This is the same document?

MR. PEDOWITZ: That's correct.

THE COURT: Doesn't it have a number?

MR. PEDOWITZ: Yes. I marked it as Government Exhibit C, your Honor.

A Yes; this is the document. My signature is on it.

MR. PEDOWITZ: Your Honor, I offer Government Exhibit C.

THE COURT: Any objection, Mr. Dershowitz?

MR. DERSHOWITZ: No.

THE COURT: It will be received in evidence.

(Government Exhibit C for identification was received in evidence.)

MR. PEDOWITZ: I have no further questions.

THE COURT: Any further questions of this witness, Mr. Dershowitz?

MR. DERSHOWITZ: No further questions of this witness.

THE COURT: All right. You are excused.

(Witness excused.)

THE COURT: We will take a brief recess. Please have the next witness in here at the close of the recess, which will be in about seven or eight minutes.

(Recess.)

A U S T I N D. C A M P R I E L L O , called as a witness by the movant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DERSHOWITZ:

Q You are currently working for the District Attorney's office in Manhattan?

A Yes.

Q And how long have you been currently working there?

A I am currently working there. I started working there in August 1971.

Q What was your role in the Ostrer investigation?

A In, I believe, August or thereabouts of 1972, I was assigned to assist a more senior assistant District Attorney, John Fine, in the investigation. Subsequently, there came a point in time when Mr. Fine left the office -- the investigation had, by and large, been completed, but

I with another investigator, examined Mr. Ostrer in the grand jury.

Q But you have been the liaison between the District Attorneys and Mr. Pedowitz's office for the purposes of transmitting tapes?

A Yes.

Q Can you represent to this Court that all the tapes that were transmitted to Mr. Ostrer, both on the bug and on the telephone, have been transmitted to Mr. Pedowitz?

THE COURT: Just ask the question simply. Have they all been transmitted? He is a witness under oath. He isn't being asked to make any representations. He is giving testimony.

A It is my belief that all of the tapes that were made pursuant to warrants on Mr. Ostrer's phones and in Mr. Ostrer's premises have been transmitted through Mr. Pedowitz to the Court, I think.

MR. PEDOWITZ: Indeed, I believe they were directly transmitted to your chambers.

THE COURT: They were initially, so as to avoid any question about custody, and I think later, counsel agreed about handling them.

MR. PEDOWITZ: Correct.

Q You are not aware of any other files that may

exist which may contain an isolated tape that fits the description you must made?

A The originals themselves are probably still sealed in our office.

Q I am talking about the duplicates.

A I'm not aware of any; no, sir.

Q Is there any possibility, to your knowledge, knowing how the D. A.'s office works and knowing now the investigatory process works -- is there any reasonable possibility, to your knowledge, that there may still be tapes in the custody of the District Attorney's office that were not turned over to Mr. Pedowitz?

A I don't believe there are, sir. No.

Q You don't think there is any reasonable possibility?

A No. All the tapes thatwere made of conversations in Ostrer's office or on Ostrer's phones, it is my belief, were all turned over to the Court.

THE COURT: Did he have a home telephone -- Ostrer?

THE WITNESS: I assume so.

THE COURT: Did you do any tapping on the home telephone?

THE WITNESS: I don't believe so, Judge. I think

it was all his phone -- his office phones. He had a series of phones in the office.

MR. DERSHOWITZ: I would like to identify the grand jury minutes of Mr. Ostrer, as conducted by Mr. Campriello, as Exhibit Number 7.

(Movant's Exhibit 7 marked for identification.)

THE COURT: Where is Mr. Ostrer?

MR. DERSHOWITZ: I am sorry. He was in the bathroom.

May the record reflect that we are prepared to proceed in his temporary absence?

THE COURT: I prefer to proceed with him here, but if he is just absent temporarily, that will be fine. Don't get him. That will be all right.

Q Looking at this exhibit, do you recall a time when you conducted a grand jury investigation and you questioned Mr. Ostrer and played for him certain tapes?

A Yes.

Q Do you recall that you played for him a tape which purported to have taken place in his office in Manhattan?

THE COURT: Is there a grand jury minute?

MR. DERSHOWITZ: Yes.

THE COURT: Why don't you mark the minutes in evidence?

MR. DERSHOWITZ: We have.

THE COURT: What number is it?

MR. DERSHOWITZ: It was indicated as Government Exhibit 7, and we will seek to introduce it in evidence.

THE COURT: We will take it. Hand it to the clerk. No one disputes the authenticity of the grand jury minutes, do they, Mr. Pedowitz?

MR. PEDOWITZ: Your Honor, I have never seen them. These are State grand jury minutes.

THE COURT: I understand.

MR. PEDOWITZ: If Mr. Dershowitz represents these were grand jury minutes turned over by the State to Mr. Ostrer pursuant to a State obligation, I have no objection.

MR. DERSHOWITZ: Yes.

THE COURT: They will be received in evidence.

(Movant's Exhibit 7 for identification was received in evidence.)

Q There is a portion of tape that you played to him in the grand jury --

THE COURT: When is this happening? What is the date of those minutes?

MR. DERSHOWITZ: It is very difficult to identify the precise date this was played, but the dates are March

5, 1974 and March 19, 1974.

Let's see -- 1406 would be March 19, 1974.

THE COURT: I see no purpose in taking testimony as to what they did in March 1974.

MR. DERSHOWITZ: I think, your Honor, I will show that it goes to establishing that we have not received all of the tapes.

THE COURT: When did you first assert that you hadn't received them all?

MR. DERSHOWITZ: We discovered it about one o'clock this morning, in going through and comparing the tapes with the transcripts of the grand jury minutes.

Q Would you read the portion of these tapes, starting with Mr. Kinsell. Just read them to yourself, to refresh your recollection, the part dealing with Mr. Kinsell and halfway through the next page, and indicate whether or not this is a true and accurate reflection of tapes that you played for Mr. Ostrer on that day in March 1974.

A I can't swear that every word is precise, but as grand jury minutes are precise, this is accurate; yes, sir.

Q This is generally the tape that you played? You had that tape in your physical possession when you played it?

A Yes, sir.

MR. PEDOWITZ: I would like an opportunity to see it, your Honor.

THE COURT: Certainly. By all means.

(Pause.)

THE COURT: How does it happen that there was an existing tape that was not turned over?

THE WITNESS: Well, unless there is a mistake somehow, Judge, I have no explanation, but I can't --

MR. PEDOWITZ: Your Honor, I think that this reel is one of the reels which we have, 3821. I may be wrong, but that is my recollection of the numbers.

MR. DERSHOWITZ: Your Honor, just to clear the record, since this isn't a jury trial, we can tell you what we discovered.

We do have a tape which indicates that number. We played it through several times. Each of us has made logs of the tapes.

This is a very critical conversation, because it talks about a date, and neither of our logs reflected a date, and, therefore, we were suspicious when we read this.

We listened through the tape as carefully as we think humanly possible and did not hear that part of the tape on the tape that we were given, which leads us to have a

basis for asking the question at least as to where that tape is.

THE COURT: I don't doubt that it is a legitimate area of inquiry. I haven't taken any position that you could not inquire.

THE WITNESS: I may be able to help, your Honor.

THE COURT: I don't know that you ought to volunteer. This is an adversary proceeding, and if you want to talk privately with counsel, you may.

MR. PEDOWITZ: May we have a moment to check our notes on 3821, so we might clear that up. I have a recollection of a conversation picked up with Kinsell. I don't know if it was pertinent to this investigation, but I would like to look it up at this moment.

THE COURT: Yes. As I recollect, the only purpose of this inquiry is to suggest that perhaps there were tapes not turned over.

MR. DERSHOWITZ: Exactly.

THE COURT: If you knew that, you should have raised it with me at nine-thirty in the morning, so you could go right to work at it.

MR. PEDOWITZ: Your Honor, I think it is fairly clear that this conversation has absolutely nothing to do with the Federal case, if that is in issue; is that correct?

THE COURT: I don't understand that to be the claim.

MR. DERSHOWITZ: That is not the claim at all.

THE COURT: The record will show the return of Mr. Ostrer to the courtroom.

MR. DERSHOWITZ: Your Honor, may I state for the record what our position is while Mr. Pedowitz is reading?

THE COURT: I suppose you can. I think your position is clear, and I see no reason why you can't pursue it.

My only problem is, I wish I had been confronted with it earlier; that's all.

If there are tapes which were not produced at this hearing, it would be helpful to find out first if that is so and, second, if so, why?

Thirdly, we could get hold of them.

MR. DERSHOWITZ: Your Honor, if we had discovered this some days or weeks ago, we surely would communicated both with the Government and the Court. We did find out late last night and wanted to inquire as to whether or not there may be files, for example, separate grand jury files, that haven't been turned over.

THE COURT: The witness may be asked.

MR. PEDOWITZ: Your Honor, I would like to take a look through the records to see whether or not it is re-

flected in the plant reports on that particular date.

THE COURT: Is there any reason why counsel should not be permitted to continue the inquiry of this witness?

MR. PEDOWITZ: Absolutely not, your Honor.

THE COURT: All right. Please resume the examination of this witness.

MR. DERSHOWITZ: I have no further questions of this witness, your Honor.

MR. PEDOWITZ: Your Honor, if we had been told about this earlier, we would have, of course searched through the record. It is difficult for me to point something out that is buried in a thousand pages of plant reports and something in a tape.

We will, of course, make every effort to locate that and advise the Court whether or not that particular conversation appears on one of the tapes.

THE COURT: I am not foreclosing the inquiry in any way whatsoever. This witness has something he is anxious to say. I told him not to volunteer, because this is an adversary proceeding. Each of you may want to confer with him outside of my hearing, if you want to do that.

Why don't I cut it short?

(To the witness:) What's on your mind?

THE WITNESS: I may have the answer, Judge. If I

could look at the grand jury minutes, that may well be a very poorly audible tape, and the grand jury minutes may reflect that it was read line by line to Mr. Ostrer or replayed. I don't know if I am thinking if it is the same one. If that's the case, then it is my assumption it is in there, and you gentlemen in listening may have missed it.

THE COURT: That is just your inference. You have no evidentiary basis to say that; isn't that right?

THE WITNESS: If the minutes that have been introduced reflected it was played line by line or read, that may be a basis for saying it, but I don't have any independent recollection of saying it.

THE COURT: Will you check the minutes and establish for us that in fact it was not played line by line; it was played consecutively?

THE WITNESS: The minutes indicate it was replayed.

THE COURT: No. I am saying the original playthrough was done consecutively, and the line-by-line was simply a reflection of the previous examination.

All the examinations were conducted in that way, were they not? The tape was first played, and then you asked Mr. Ostrer to explain particular lines?

There is no evidence in that transcript, is there,

to suggest there was particular problem of audibility with that piece of transcript?

THE WITNESS: Yes; there is. The fact that after -- at the end of playing it through, as you indicated, the transcript indicates that the tape was turned on and replayed.

Now, I don't know if subsequently -- and on three or four pages later, it indicates the tape was turned on again and replayed, and then the tape was turned off.

On another page, the tape was turned on again and again. It was turned on several times. Isn't that what's reflected here?

THE COURT: Isn't that what was commonly done with the investigation: that you would play the tape once; you would ask him questions, and then you would play portions of the tape back and ask him to interpret or identify particular portions of the tape?

THE WITNESS: That happened in many instances.

THE COURT: And that is consistent with what you just pointed to here?

THE WITNESS: Yes, sir.

THE COURT: Anything else?

MR. PEDOWITZ: Yes.

CROSS-EXAMINATION

BY MR. PEDOWITZ:

Q Mr. Campriello, with respect to the number of the tape that is referred to at the beginning of the conversation, what is that number?

A The number here is A-3821.

MR. PEDOWITZ: Will counsel concede that A-3821 is one of the tapes that was turned over, at least one of the numbers of the tapes that was turned over pursuant to subpoena?

MR. DERSHOWITZ: That is what we originally stated: that there was such a tape with such a number turned over, and that was the one that was played, and we were not able to hear the conversation.

THE COURT: May I see the grand jury testimony? You just tell us you interpreted it differently on listening?

MR. DERSHOWITZ: No. We heard nothing on the tape that in any way reflects that conversation or anything like it.

It is not a question of disagreeing with the substance of what is stated, no.

THE COURT: All right.

BY MR. PEDOWITZ: (Continued)

Q Mr. Campriello, would it also be fair to say that the date of the conversation which you referred to as having occurred in Mr. Ostrer's office is January 17, 1973?

A Yes. That's the date that is reflected in the page I am looking at.

Q Was that one of the dates during which you had that particular tape running in Mr. Ostrer's office?

A That was a date on which a tape was running. The tape that I played in the grand jury was a re-recording of the original.

Q Would it help you if I refreshed your recollection with your letter to Mr. Dershowitz and to the Court, advising the Court as to what days 3821 was running in Mr. Ostrer's office?

A Yes. My letter reveals that A-3821 covered the period of December 22, 1972 through January 29, 1973. So this would fall within the date reflected in the grand jury minutes, would fall within the date -- the addendum to my letter reflects that as having covered, or the original of it.

MR. PEDOWITZ: Without listening to the tape in its entirety, I can't represent to the Court that the conversation appears, and, indeed, Mr. Dershowitz takes issue

with the fact that it does. We will make every effort to determine where that particular conversation is located in the tapes, if it is.

THE COURT: All right. You may do that.

I suppose we should ask the witness to renew his inquiry to see whether any tapes have not been produced.

THE WITNESS: I will do that, your Honor.

MR. DERSHOWITZ: Your Honor, may we have one --

THE COURT: Will you advise counsel and the Court of the outcome of your search, whether it be negative or affirmative? If you have anything additional, will you please submit it to counsel in the same fashion as we did before, and if your research finds nothing, will you tell us briefly what you have done and the ultimate fact of what you found or didn't find?

MR. DERSHOWITZ: May I ask one further question and then make a request?

THE COURT: Certainly.

REDIRECT EXAMINATION

BY MR. DERSHOWITZ:

Q I take it the original tape recording were re-recorded at some time, to your knowledge.

A Yes.

Q And it is at least conceivable, is it not, that

matter which appeared on the original tape recordings which are now in the custody of the Supreme Court might not have been reproduced, by some accident or some method might have not been reproduced on the reproductions which were then transmitted to Mr. Pedowitz?

A It is conceivable, but it is extraordinarily unlikely, and my assumption is that what was turned over to Mr. Pedowitz was what was played in the grand jury, not the original.

THE COURT: You would not use the originals in the grand jury?

THE WITNESS: I don't think we do, your Honor.

THE COURT: Do you have any doubt about it?

THE WITNESS: No, your Honor. That's a re-recording, all right.

MR. DERSHOWITZ: The only request I was going to make, your Honor, is, if it turns out, upon rehearing, that there really is no plausible explanation, that perhaps the next step might be to check the originals. That was my only suggestion, although you may find fault with that.

THE COURT: We will see what we find out.

THE WITNESS: As part of complying with your Honor's instruction or request that I check, may I be permitted to confer with the detectives who amassed this informa-

tion for transmittal to the Court? They are going to be, apparently, witnesses in this proceeding. May I go back and confer with them to see what steps they took and if they have any explanation that doesn't come to my mind?

MR. DERSHOWITZ: We have no objection.

MR. PEDOWITZ: Your Honor, I have a few questions for Mr. Campriello.

THE COURT: All right.

RECROSS-EXAMINATION

BY MR. PEDOWITZ:

Q Sir, the investigation you conducted in this case was conducted only by the State, was it not, and not in conjunction with the Federal Government?

A Yes. This was a State investigation.

THE COURT: What precisely were they investigating? What was considered to be the relevant boundaries of the inquiry?

THE WITNESS: The inquiry started out as an inquiry, apparently aimed at gambling. It changed into an inquiry aimed primarily at the crime of criminal usury. Does your Honor want me to name names?

THE COURT: No. I just wanted to see what the scope of the inquiry was.

THE WITNESS: Ultimately, it broadened to in-

clude, I believe, murder, I believe crimes pertaining to labor officials.

THE COURT: State crimes?

THE WITNESS: Yes, your Honor.

Q Mr. Campriello, while the taps and the bugs were installed on Mr. Ostrer's phones and in his office, did you at any time turn over information learned from them to any Federal officer or Federal official?

A No.

Q Sir, did you attend the meeting between John Fine and assistant United States Attorney Harold McGuire on December 22, 1973?

A No; I did not.

Q Do you know where you were on that date?

A I was in Erie, Pennsylvania.

Q Sir, at a subsequent time, in April of 1973, did you attend a meeting between assistant United States Attorney McGuire and assistant District Attorney Fine?

A Yes.

THE COURT: What do I care about April?

MR. PEDOWITZ: Your Honor, the meeting in April will reflect the fact that all of the detailed information which is being requested in this particular matter was turned over in April 1973, not December of 1972.

It reflects the fact, your Honor, that the information which is disputed here was not turned over until later.

THE COURT: All right. Go ahead.

Q Sir, in April of 1973 -- I think the date was April 18, 1973 -- did you attend a meeting between assistant District Attorney Fine and Harold McGuire, a Federal prosecutor?

A Yes, sir; I did.

Q Sir, do you recollect what the nature of that conversation was?

A My best recollection is that John, in general, at that meeting --

THE COURT: John Fine?

THE WITNESS: John Fine. Excuse me.

A (Continuing) -- described the nature of our investigation to Mr. McGuire. The best recollection of anything I have concerning that meeting is my own impression of what Mr. McGuire was or was not going to do in connection with the Moss matter.

Q Was a possible obstruction of justice of Aubrey Moss discussed at that meeting?

A I believe it was, because I recollect that my impression was that Mr. McGuire did not think that following

that up in any way would be very fruitful, so I recollect having that impression after that meeting; so I am certain that it was discussed at the meeting.

THE COURT: You mean an assistant United States Attorney declined prosecution of a case?

THE WITNESS: He may not have felt --

THE COURT: No conspiracy charge?

MR. PEDOWITZ: Mr. McGuire will discuss that in more detail as to what his intent was with respect to the obstruction of justice.

THE COURT: All right.

Q Outside of the police officers involved in the investigation and the assistant District Attorneys involved, did you communicate any information learned on the wire taps or the bugs to any other person, when the taps and the bugs came to an end in February 1973?

A No.

THE COURT: Let's find out.

With whom did you discuss the contents of the recordings during that period?

THE WITNESS: Clearly, with Mr. Fine.

THE COURT: Yes?

THE WITNESS: Clearly, with Mr. Scotti; clearly, with Detective O'Rourke; clearly with Detective Brennan;

probably with Sergeant Garabedian, Detective Finley, McGuire and Collins.

Q By McGuire, you are referring to t - police officer?

A Yes. They are police officers. There were other detectives assigned to the investigation. I may have discussed it with them, but --

THE COURT: Could you give us the names of the other people with whom you think you may have discussed it?

THE WITNESS: I don't think I did, your Honor. It's just because they were assigned -- it would not be --

THE COURT: But you have no recollection of talking with them about it?

THE WITNESS: No.

THE COURT: All right.

Q Sir, did you have any policy in your office with respect to allowing police officers to turn over information overheard on wire taps or on bugs to any person outside of the District Attorney's office?

A Yes. My understanding is that a police officer would not do that without getting the permission of an assistant District Attorney.

MR. PEDOWITZ: I have no further questions, your Honor.

THE COURT: Anything else for this witness?

MR. DERSHOWITZ: Yes: a couple of questions.

REDIRECT EXAMINATION

BY MR. DERSHOWITZ:

Q You mentioned that the investigations were solely State investigations of State crimes; is that correct?

A Some of those crimes may have been Federal. I'm not familiar with Federal law sufficiently to define those, but our investigation, was we perceived it, was a State investigation, involving State crimes.

Q What about the alleged crime of obstruction of justice? Would that have been an obstruction of Federal justice or an obstruction of State justice?

MR. PEDOWITZ: Your Honor, the companion concept under State law is coercion of a witness.

THE COURT: I am not sure, myself, you see, whether coercing a witness in a non-State proceeding is a State crime in New York.

MR. PEDOWITZ: I can't represent that. I can certainly research it for your Honor.

THE COURT: It isn't necessary. The question is permitted, and the objection is overruled.

MR. PEDOWITZ: Your Honor, for the record, Government Exhibit C, which was the extension and amendment of the

order, did permit overhearing of conversations between November and Ostrer relative to coercion of a witness, so the impression of the State Judge, at least at the time, was that a Federal --

THE COURT: I understand, but it is permissible cross-examination.

THE WITNESS: Could I have the question repeated, your Honor?

THE COURT: Reframe the question, please.

Q Was the investigation relating to obstruction of justice an investigation relating to obstruction of State justice of Federal justice?

MR. PEDOWITZ: Your Honor, I am going to object to the question. The form of the question seems highly ambiguous to me.

THE COURT: If he doesn't understand it, he can tell us he doesn't.

MR. DERSHOWITZ: Perhaps I can reframe the question, your Honor.

Q To your knowledge, was Moss to be a witness in a Federal case or a State case?

A A Federal case.

THE COURT: Did you consider that there was a possible State crime committed in connection with the Moss

matter?

THE WITNESS: It may be -- it may be that what we thought happened there could be fitted into the State definition of coercion. I would have to see the statute.

Q Is it not clear that at best this was an investigation of a joint crime with a substantial Federal interest?

THE COURT: That is argumentative. You don't have to go into that. If there is a possible State crime committed here, I will take a reference to the statute from either attorney, the statute being the best evidence of it.

Q Was there a reference to a possible Federal crime here?

A I don't understand what you mean by, was there a reference to, Mr. Dershowitz.

Q Was your investigation of an alleged obstruction of justice --

A We don't have an obstruction of justice statute in the State. There is no statute named "Obstruction of Justice", I don't believe.

Q There came a time, did there not, when you asked for a wire tape authorization to investigate a relationship between a witness in a Federal prosecution named Aubrey Moss and a defendant in a Federal prosecution named Louis Ostrer; is that correct?

A If it's in the application, yes.

Q I am asking you of your own knowledge.

A I don't recollect. There were a number of crimes in the application.

Q You do not recollect at this point whether there was an application for a wire tape involving conversations between a witness in a Federal case and a defendant in a Federal case?

A Independently, no.

Q No: as part of an on-going investigation of Mr. Ostrer, could you recall that being an independent ground for a continuation of a wire tap and expansion of the wire tap?

A I don't recall it, no. I can't say it didn't happen, Mr. Dershowitz. I just don't recall it. My guess is, it did happen.

Q You testified that you were in Erie, Pennsylvania, at the time of the December meeting between Mr. Fine and Mr. McGuire. Were you told at any time that such a meeting was to take place?

THE COURT: At any time prior to January 26th?

Q (Continuing) Prior to January 26th.

THE COURT: 1973.

A Was I told prior to January that the December

meeting was going to take place?

Q Were you told any time prior to the December meeting that there was going to be a meeting between Fine and McGuire -- and stop there.

A I'm certain I was. I can't recollect the exact setting, but I'm certain I knew.

Q Were you told after the meeting that there had been a meeting?

A I must have been.

MR. PEDOWITZ: Your Honor, I have no strong feeling about pursuing this line, but it seems to me to be getting into an -- it is hearsay certainly what he was told after the meeting about what happened.

If your Honor wishes to hear it for what it is worth I have no objection.

MR. DERSHOWITZ: We don't seek it as hearsay at all. We seek it as direct evidence as to what Mr. Fine may have told him occurred at the meeting. That would be direct evidence as to what Mr. Fine said.

THE COURT: It would not necessarily, but I will take it. I doubt it is admissible. Mr. Fine is alive and well and available for testimony. However -- you see, with a proper threshhold showing I might permit it if on cross examination Mr. Fine was asked what he told this witness and it was believed that the answer was untruthful.

Let's take care of that so we won't have to come back.

What's the answer?

MR. DERSHOWITZ: I think I have to begin the question again.

THE COURT: All right.

Q Did Mr. Fine ever tell you that Ostrer really

had something on Moss or words to that effect?

MR. PEDOWITZ: Objection, your Honor. That most certainly is not the same question that was asked.

THE COURT: He can answer it yes or no. Ever before January 26th of 1973 did he tell you that in words or substance.

A I have no recollection, Mr. Dershowitz.

Q Did Mr. Fine ever tell you in words or substance that Mr. Ostrer was trying to get Moss to change his testimony in the federal trial?

A He may have told me that.

Q Did he give you any details as to what Mr. Ostrer was allegedly trying to do to coerce a witness or obstruct justice?

MR. PEDOWITZ: Your Honor, I object to this whole line as hearsay and irrelevant.

THE COURT: Yes, I think so. He can answer it yes or no.

A Did Mr. Fine give me details about what he believed Mr. Ostrer was trying to do?

Q Yes.

A I am certain he must have.

Q But you don't recall at this point what those details were?

A Let me think. You see, Mr. Dershowitz, I may have known independently of Mr. Fine because if it is on a plant report I may have seen that and it is very difficult for me to winnow out what I was told from Mr. Fine as opposed to what I may have been told by a detective or what I may have been told by a plant report.

THE COURT: Well, did it go the other way? Were you giving input to Mr. Fine from these tapes?

THE WITNESS: No. What would happen --

THE COURT: Were you telling Mr. Fine the substance of what was on the tapes?

THE WITNESS: No. As a general rule, Judge, what would happen is we would never listen to the tape at that point in time. What would happen is the detective would make a plant report and the plant report would come down.

My recollection is that these plan reports went first to Mr. Fine as the senior assistant. It is conceivable if he were out a day they may have come to me.

In any event we would look at the plant reports and we would see what was on the plant reports and then Mr. Fine and I would talk about the plant reports.

THE COURT: When if ever would you listen to the underlying tape which supported the plant reports?

THE WITNESS: In preparation -- well, in occasional instances the tape itself might be brought down. Generally we would listen to them either in preparing for the grand jury presentation, if it got to that stage, we would listen to them played in the grand jury.

There were some instances when I think I helped type up transcripts in connection with a grand jury.

THE COURT: When,if ever,did you listen to the tape first of November 21, 1972? When, if ever, did you first listen to it?

THE WITNESS: Nobody told me what's on it, Judge.

THE COURT: That is the one presumably where they are talking about Moss, intimidating or coercing Moss. Am I correct in the selection of the tape?

MR. DERSHOWITZ: You are correct, but I would hope your Honor would withhold judgment as to what is in the tape.

It is our contention --

THE COURT: As I understand this witness, it is his contention that at some point he learned, whether from Mr. Fine or the plant reports, that attempts were being made to coerce a witness.

Is that your testimony?

THE WITNESS: Yes. Or from detectives, Judge.

THE COURT: Or from detectives. When, if ever, did you first hear the underlying tapes which were relied upon in support of that conclusion? You personally, when did you first hear?

THE WITNESS: I don't know, Judge. I don't know if that is something that they would have brought the tape down and we would have listened or if we would have relied on the plant report.

THE COURT: Do you have any independent recollection of ever hearing those tapes?

THE WITNESS: I don't have any independent recollection, Judge, no.

THE COURT: You may continue, Mr. Dershowitz.

Q Did you attend any meetings with Mr. Fine or others in your offices in which you discussed whether or not to turn this information over to the federal government?

MR. PEDOWITZ: Your Honor, I am going to object to this as entirely irrelevant.

THE COURT: I will overrule the objection.

A Again, Mr. Dershowitz, I can't bring back a mental image of the meeting. I am certain I would have discussed this with John Fine. I may well have been present

when John discussed it with Mr. Scotti because I am certain John would have discussed something like this with Mr. Scotti.

Detectives may have been present when I discussed it with Fine; conceivably when we, if I did, discussed it with Mr. Scotti. It is conceivable that I discussed it with Brennan, O'Rourke or Garabedian independently of John.

Is that what you --

THE COURT: Who made the decision to go to the federal authorities?

THE WITNESS: The ultimate decision would have been made by Mr. Scotti.

THE COURT: Who talked with Mr. Scotti concerning the making of this decision?

THE WITNESS: Mr. Fine definitely did. I may have been present and had input in that as well.

THE COURT: Do you have any recollection of the contents of discussions with Mr. Scotti in this regard? What did you tell him is what I am really asking you.

THE WITNESS: The difficulty, is I am not sure I was there. I can tell you what Ithink I would have told him or what would have been told had I been there, but I can't say for certain I was.

THE COURT: All right, if you don't know you don't know.

Q Do you recall a conversation where Mr. Fine said in words or substance in your presence, "We have got to get this information to the federal government about what Mr. Ostrer has on Moss"?

A He may well have told me in substance that we had to transmit the information.

THE COURT: And to do that you had to obtain Mr. Scotti's permission?

THE WITNESS: Yes.

THE COURT: And both of you knew that?

THE WITNESS: I certainly did and John did as well, I am pretty certain.

Q Were you involved in any discussion with Mr. Fine or Mr. Scotti in which the problems raised that to transmit this information to Mr. Maguire and the federal government might raise constitutional problems because of the wiretap?

I am just asking you whether you were involved in any such discussion.

MR. PEDOWITZ: Your Honor, I object to this as irrelevant.

THE COURT: I am not sure it is irrelevant. He

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can answer it yes or no.

A Can you repeat it, Mr. Dershowitz, please?

MR. DERSHOWITZ: Yes.

THE COURT: The reporter will read it back.

(Record read)

A Again, without Mr. Scotti, because I am not certain if I discussed it with Mr. Scotti or not, as I recollect what we were concerned about at that time was on the one hand preserving the secrecy of our investigation, which would gravitate against turning information over, but on the other hand making certain that what we perceive to be a potential for perjury did not occur in a federal case.

I am not certain whether we discussed the impact of if any of the earlier warrants were subsequently found to have been not supported by probable cause, any effect that would have on the federal case because I am certain that nobody ever intended to tell the federal government we had wiretapping.

THE COURT: When did you first have any basis to believe that your state wiretaps might have been improperly authorized?

THE WITNESS: As to the one that was thrown out by the Court, I don't believe, Judge, I ever saw that

until after Mr. Fine had left the office. In other words, when I got involved in the case I saw the wiretaps from around that time on up. I don't think I ever went backwards because they went back quite a bit in time, Judge.

THE COURT: All right.

Q You of course knew that Mr. November was an attorney, did you not?

A I know it now. I may have known it then. If it is revealed on the tapes that Mr. November was an attorney -- actually I should say on the plant reports, that knowledge is probably chargeable to me even though I can't --

THE COURT: Don't worry about whether it is chargeable to you. Did you know it?

THE WITNESS: I can't recall.

Q Do you recall hearing Mr. November talk about Second Circuit Court of Appeals opinions on impeachment evidence?

MR. PEDOWITZ: Objection, your Honor, since it does not refer to the Second Circuit, it refers to the Court of Appeals, which I take it is referring to the New York Court of Appeals?

THE COURT: I don't know. I thought he was referring to the Second Circuit in the transcript here,

but as I understand it this witness did not hear the tapes, all he saw was a plant report.

Q Do you recall reading any references in the plant reports to legal discussions, strategic discussions between Mr. NOvember and Mr. Osterer?

MR. PEDOWITZ: To cut this short, we will concede, your Honor, that at the time Mr. Fine discussed this matter with Mr. Scotti, that they were aware of the fact that Mr. November was an attorney.

THE COURT: "They" being Mr. Scotti and Mr. Fine?

MR. PEDOWITZ: That's right.

MR. DERSHOWITZ: That's enough for us, your Honor.

Q You indicated the problem you saw was on the one hand preserving the secrecy and on the other hand getting the information to avoid perjury to the federal government.

A Those are the major problems I recall. I don't know whether we addressed our attention to the other question,but my guess is we did because it would have been a prudent thing to do.

THE COURT: The other question being what?

THE WITNESS: Being if there was anything

wrong with the orders, but -- you see, if we thought there was anything wrong with the orders at that point in time presumably we wouldn't have continued the investigation, so I don't think that was a big concern.

Q You have never continued an investigation where there was some question that the ultimate order might be successful?

MR. PEDOWITZ: Objection.

THE COURT: I should think you would be delighted in having him answer that question. The objection is almost as foolish as the question.

MR. PEDOWITZ: Yes, your Honor, but it may have a deterent effect on further questions like that.

THE COURT: I don't think so. Go on to something else.

Did you really expect him to answer that he had continued investigations when he knew fully well that his underlying authority was no good?

MR. DERSHOWITZ: No, I said whether there was some question that the ultimate order might be held invalid.

In my experience that has happened on many occasions.

Q You did testify that there came a time shortly

after the conclusion of the Ostrer trial when you did make full disclosure to the federal government about your wiretapping investigation, did you not?

A No, I didn't. I testified that in April -- I am not certain when Mr. Ostrer's trial ended. I think it ended sometime in January.

Q Yes.

A In April there was a meeting at which I attended at which Mr. Fine in general explained the investigation to Mr. Maguire.

Q So at that point after the termination of the Ostrer trila you were no longer concerned about the problem of secrecy of your investigation vis-a-vis the federal government, is that right?

A At the time I think, and I would have to check, all wiretapping in that investigation had concluded and that we were -- yes, I think everything had concluded just about in that investigation other than grand jury type work, so there was nothing to be secret about.

In other words, we were out of Mr. Ostrer's premises long before that, I believe, so why be concerned about information about the existence of a tap that's no longer in existence, if I am following the question.

Q But at the time that you actually heard about

discussions, the discussions about whether to turn the material over or not, there were three, were there not, possible conversations as you described them, the perjury problem in the federal courts, the secrecy problem and as you testified the possible constitutional prudential problem?

A Again, you know, it is very difficult for me to separate what I see as problems now, knowing everything that I know that's happened since, from what happened at that time.

The major things that I can recall were secrecy, because as I -- well, secrecy versus a duty we had not to allow what we thought possibly could be perjury to happen over here.

Q Do you recall any conversation in which you discussed not the problem of the validity under the Fourth Amendment of the warrant for the wiretap, but rather the problem of overhearing lawyer-client conversations, do you recall ever participating in such a discussion?

THE COURT: Not ever. I will only take it prior to the date of the meeting.

Q I think you can assume my question always has that date as a limitation.

THE COURT: We cannot make any such assumptions.

MR. PEDOWITZ: I object to this line. If your Honor is going to permit this to happen, namely to go into the discussions in the DA's office then I will start withholding my objections, but Istill think this matter is irrelevant.

THE COURT: The difficulty with all this is because as I understand it it was Mr. Scotti and Mr. Fine who made this determination and who went and met with Mr. Maguire of the U.S. Attorney's Office.

Isn't that so?

MR. PEDOWITZ: That's correct. Mr. Scotti was not there, Mr. Fine was.

THE COURT: So it isn't too relevant to this witness. You can answer it yes or no .

THE WITNESS: Can I have it again, Judge?

THE COURT: Yes, read it back, please.

MR. DERSHOWITZ: Shall I rephrase it?

THE COURT: He can read it back.

(Record read)

A I don't recall, Mr. Dershowitz.

MR. DERSHOWITZ: No further questions of this witness, your Honor.

THE COURT: Anything else?

MR. PEDOWITZ: No, I have nothing.

THE COURT: You are excused.

(Witness excused)

MR. DERSHOWITZ: We would like to call as our next witness Detective Brennan.

Your Honor, may the record reflect that just this morning in the midst of the proceedings did we learn for the first time that Mr. Brennan, Detective Brennan may have attended the crucial meeting between the United States attorney and Mr. Fine.

THE COURT: I don't see anything particularly significant about that fact, but if that be so you may note it.

D E N I S P. B R E N N A N, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DERSHOWITZ:

Q Detective Brennan, are you experienced in matters of tape recording and eavesdropping?

A Yes.

Q Can you indicate to us how a conversation in the Ostrer investigation was conveyed from the bugged

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microphone to the tape recorder, not the circuitry, but what the general connective links were, how it operated?

A I am not quite sure I understand your question.

Q Was it done by direct line, by radio transmission?

THE COURT: Let's distinguish in our mind first the telephone and the bug and find out exactly what you are talking about first and then you can ask him -- are you talking about the bug now?

MR. DERSHOWITZ: Let's talk about the bug first.

Q Was the bug transmitted by air waves or by direct lines?

A By telephone lines are you saying?

Q No. Was the bug, that is the non-telephone eavesdropping device that presumably was secreted in a wall somewhere.

A Yes.

Q Was that transmitting by air waves, by the use of radio waves or was it transmitting by the use of a direct wire?

A I am afraid I can't answer that question. I don't know.

THE COURT: How did it come to you when you were sitting in the plant, the voice that came on the bug?

THE WITNESS: It came through the tape recording machine.

Q So the same speaker that was on the tape recorder that you might use for playback also played the voice from the bug and recorded it at the same time?

MR. PEDOWITZ: Your Honor, I have to object to that because I can't understand it.

THE COURT: If the witness does not understand he can say so. You and I might not understand it, but maybe he can.

A I am afraid I don't understand.

Q Let me ask you the question directly.

Under the mechanism that you were operating with could you hear things and not record them?

A Yes.

Q But what you heard, would that come through the speaker of the tape recorder or a separate speaker?

A I really don't know.

Q Do you know the model number and make number of the tape recorder that was used?

A I believe it was a Tandberg.

THE COURT: Is there any dispute about this? Didn't you agree that they could hear things without

recording it?

MR. DERSHOWITZ: The purpose of these questions is simply to aid our expert who is going to be doing an analysis.

THE COURT: Did you dispute the last witness' testimony about how they operated?

MR. DERSHOWITZ: No.

THE COURT: We do not need cumulative evidence because I don't understand the government to be disputing them.

MR. PEDOWITZ: No.

THE COURT: We are not seeking cumulative evidence, just thirty seconds of this to help our tape expert.

THE COURT: All right.

Q Do you recall the speed ofthe tape at which the original recording was made?

A I am afraid not.

Q Do you know whether or not you always used new tape or on occasion did you rerecord over old tape?

A Well, we never rerecorded over old tape.

Q You always used brand new tape from a new box?

A Correct.

Q Did there come a time when you attended a

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meeting between Assistant United States Attorney Maguire and Assistant District Attorney John Pine?

A Yes.

Q Can you approximately tell us when that meeting occurred?

A I would say in late '72.

Q Do you remember who else was at that meeting?

A Mr. Fine and I believe Detective John O'Rourke.

Q Was Detective Finley at that meeting?

A I don't recall.

Q But he may have been, yes.

Q Were there others who may have been at the meeting?

A That's possible, yes.

Q Do you recall where the meeting took place?

A In Mr. Fine's office.

Q Where is that located just for the record?

A The seventh floor of the District Attorney's office at 155 Leonard Street.

Q Do you recall whether you signed into the building when you cameinto that meeting?

THE COURT: Do you doubt he was there?

MR. DERSHOWITZ: No. I want to find out who else was there.

THE COURT: I don't care. This is not the way to do it. You are wasting my time. I will permit him to answer it, but it wouldn't show us anything if he was there or not.

MR. DERSHOWITZ: It would establish us to investigate to see if we can establish if Mr. Finley was there.

THE COURT: Mr. Finley says he can 't remember if he was. If you show me he was there and he forgot about it, I don't know what inference I would draw from that. It is possible for a person to attend a meeting in 1972 December and forget that he was there.

All right, did you have to sign in to get into the building?

THE WITNESS: Not to get into the building, your Honor, to get into our squad room. You had to log in --

THE COURT: We are talking about getting to Mr. Fine's office.

THE WITNESS: No.

THE COURT: Okay, next question.

Q Can you relate to us the circumstances leading up to that meeting in which you participated, any discussions leading up to that meeting in which you participated?

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MR. PEDOWITZ: Objection, your Honor. Irrelevant.

THE COURT: Well, he can answer it yes or no whether he recalled.

A No.

Q Do you recall the meeting?

A Vaguely.

Q Did you refresh your recollection by checking any notes to help you establish whether you were at that meeting?

A No.

Q So you do recall thatyou attended such a meeting?

A Correct.

Q Do you recall --

A I vaguely recall attending such a meeting.

Q Do you recall in that meeting any discussion of Louis Ostrer having some information derogatory of Aubrey Moss?

A No.

THE COURT: Who directed you to attend that meeting?

THE WITNESS: Judge, let me say this. The meeting was not so much a meeting, at least as I saw it.

I worked in Mr. Fine's office almost on a daily basis. I was generally present in Mr. Fine's office doing work attendant to the investigation.

In most cases it was paperwork. If I was there I was there just because I happened to be there. I was not, as I recall, called to a particular meeting.

THE COURT: Did Mr. Fine tell you to come into his room and attend this?

THE WITNESS: I was already in the room, your Honor.

THE COURT: You and he shared a room?

THE WITNESS: We were sharing his office as a matter of fact. He had his desk in one corner and I had a desk in another corner and I was there almost on a daily basis. In fact, many times I was there before Mr. Fine.

Q Is this a meeting that you walked in and out of?

A Correct.

Q You walked in and out. The door was opened during the meeting to your recollection?

A Any meetings that he would have, if he had somebody in there and he was discussing something with, he would have the door closed.

Q But you recall that this was a meeting that

you didn't sit in during the whole of, but you perhaps walked in and out?

A Correct.

Q Do you recall again anybody who might have walked in during the meeting?

A No.

Q Do you have any recollection whatsoever about what substantively transpired at the meeting, what was discussed?

A No.

THE COURT: You don't remember what the subject matter of the meeting was?

THE WITNESS: I really don't, your Honor.

Q Can you explain to us how you remember that you were at this particular meeting without remembering what the subject matter of the meeting was?

A I vaguely recall that the U.S. Attorney was there. That's all I remember.

THE COURT: Was it a rare thing for the United States attorney or his assistants to come to Mr. Fine's office?

THE WITNESS: I would say so, your Honor.

THE COURT: Is that why you remember it?

THE WITNESS: That's why I remember it, yes, sir.

Q Do you remember a meeting in April with Mr. Maguire and Mr. Fine?

A No.

Q Were you at such a meeting? I take it your answer is no.

A No.

Q May I show you Exhibit No. 1 and ask you whether it is a typewritten copy of logs that you either typed or were responsible for having typed.

A Yes.

Q Did you type them yourself?

A I certainly did.

MR. PEDOWITZ: Your Honor, if Mr. Dershowitz would make reference to what it is he was showing the witness it would be helpful.

MR. DERSHOWITZ: Exhibit 1, I'm sorry.

Q Will you note by 11:55 there is a 1, 2, 3, 4, 5, 6, 7 lined typed summary of a conversation between Barry Mayham and Susan.

A Yes.

Q Now, the last initials after that conversation are "N.R."

Can you tell us what that means?

A Yes. That indicates that the conversation was

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not recorded.

Q Not recorded.

Now, the conversation is as follows: --

THE COURT: It is in evidence. You don't have to read it.

MR. DERSHOWITZ: I am sorry.

Q Your testimony, then, is that you listened to this entire conversation and did not record it?

A That's correct.

Q Can you estimate on the basis of the lines here how long that conversation may have been? You will note it goes from 11:55 to 12:00.

A How much time?

MR. PEDOWITZ: Can I have from Mr. Dershowitz representation as to whether or not this is believed relevant to Mr. Ostrer's trial?

MR. DERSHOWITZ: I think I should be able to examine the witness at this point directly.

THE COURT: Hand me the exhibit, please.

MR. DERSHOWITZ: I am trying to establish a modus operandi of how tapes are listened to and what is recorded and what is not. I frankly haven't even read the subject there. It is only a matter of time. I don't even know what it relates to.

THE COURT: Well, I would permit reasonable inquiry. Is this Susan, Susan Gold?

MR. DERSHOWITZ: Frankly, your Honor, I did not read it. I was just looking for length of time but I will look through it now.

THE COURT: Look through it now.

Q For about how long would you say that conversation might have run?

A I really wouldn't know.

Q Certainly it could have been as long as five minutes, could it not?

A Was it a common occurrence that you would listen to five minute long conversations and then decide not to record them?

THE COURT: I think I ought to have an offer of proof. If he has already listened to it the cat is out of the bag and you cannot record it. It is over if he is not recording it and is listening.

A It may have been a situation --

THE COURT: There is no question.

Q The question, then, is this: Were there conversations that you decided not to record but nonetheless listened to?

A No.

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THE COURT: What about that particular one there?

THE WITNESS: That might be a situation, your Honor, where I was going from one phone to another and when we went back to that phone realized he was still still talking about the same incident. In other words, you are assuming that I listened to that conversation for that length of time without interruption.

What I am saying to you is it is quite possible that I was listening to another phone or two at another time and then went back to that conversation and as a result of a five minute period was able to piece together the substance of the conversation and it was never recorded.

Q So I take it then your testimony is that you would on occasion hear converstion, perhaps not consecutively but would hear conversation and then make a note in a summary of what that conversation is which was transmitted to one of your senior officers, but you would have no recording of that conversation?

A No. Not so.

THE COURT: What is it that is negative about that answer? What about it?

THE WITNESS He is saying that I would make a note to the effect of a conversation not recorded and

pass it on to my superiors.

Q Did you pass this on to your superiors?

A Yes, that's the plant report.

THE COURT: Other than the plant report did you ever pass onthe content of not recorded conversations?

THE WITNESS: No, your Honor.

THE COURT: But you did do so in the plant report?

THE WITNESS: Correct, your Honor, and indicate it was not recorded.

THE COURT: And what was the reason for not recording it?

THE WITNESS: Because it was not pertinent to the investigation.

Q Did you ever have personal discussions about the case with Mr. Fine?

A Yes.

Q Did you ever tell him what you heard on the tape that day or a few days earlier?

A Only what was recorded.

Q I understand that, but did you sometimes tell him what was recorded? Did you sometimes say today we listened to Louis Ostrer talking to so and so and we recorded the following conversation?

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A Yes.

Q Did you sometimes say today we listened to a certain conversation?

A That wasn't recorded?

Q I am not asking you that. Did you ever say today we listened to a certain conversation?

A No.

Q You only communicated orally that which was recorded?

A That's correct.

Q But you concede that you did communicate in writing matter that was not recorded?

A That is my plant report, that is correct.

MR. DERSHOWITZ: I would like to mark this Exhibit No. 8.

(Movant's Exhibit 8 marked for identification)

Q I just ask you briefly to look at these two conversations and indicate again whether these were conversations which by the notations NR were not recorded, but which by the fact that you took seven or eight line summaries indicated you listened to those conversations.

A Again I would have to say that these conversations were not listened to unbroken. In other words, these

were conversations going back and forth on different phone calls that were ringing to get the substance of the conversation.

Q But you did listen long enough to get enough of the substance of the conversation to write a seven-page -- seven line summary and nonetheless it was not reported?

A That's correct.

MR. PEDOWITZ: Your Honor, may I see these if they are being offered?

THE COURT: Certainly. Everything which is in evidence has to be shown.

MR.PEDOWITZ: Is it being offered, your Honor?

MR. DERSHOWITZ: We would like to offer those in evidence, yes.

THE COURT: Mark them.

BY MR. DERSHOWITZ:

Q Do you keep a diary of any kind?

A No, I do not.

THE COURT: The question really is did you keep a diary in 1972.

THE WITNESS: No, I did not.

MR. DERSHOWITZ: Just a couple of more questions.

Q Is it true that Mr. Fine generally in your experience having shared an office with him takes rather

extensive notes?

THE COURT: Isn't Mr. Fine alive?

MR. DERSHOWITZ: Yes, but we may get -- if we want to recall this witness later that would be fine, but we would like to save time by asking him a couple of questions.

THE COURT: Do you think Mr. Fine is going to come in here and say he doesn't take extensive notes? The form of the question is bad. Everybody takes notes in this business.

Q Do you recall whether or not Mr. Fine took notes of the meeting that you attended with the United States attorney in December of 1972?

A Do I know in fact that he took notes?

Q Yes.

A Or did I know then that he took notes?

Q Do you know now or did you know then?

A No.

Q In your experience having shared an office with him was it his general custom to take notes of interviews between witnesses and himself?

MR. PEDOWITZ: Objection.

THE COURT: It is not between witnesses and himself.

. DERSHOWITZ: I'm sorry.

Q Notes of interviews, notes of meetings.

MR. PEDOWITZ: Objection.

THE COURT: I will let him answer it.

A I would say yes.

MR. DERSHOWITZ: No further questions of this witness.

THE COURT: Anything else?

MR. PEDOWITZ: A few questions, your Honor.

CROSS EXAMINATION

BY MR. PEDOWITZ:

Q Detective Brennan, to your knowledge was the federal government involved in the investigation of Louis Ostrer?

A Yes.

Q At what point?

A I don't recall. I know at sometime during our investigation the federal government had some sort of a case against Mr. Ostrer.

Q The particular investigation that you had in the DA's office, was the federal government a participant in that investigation?

A Absolutely not.

Q While the bugs and the taps were installed

on Louis Ostrer's phones and office, did you at any time communicate any information that you had obtained from those bugs and taps to any federal officer?

MR. DERSHOWITZ: Objection, your Honor. He already testified he doesn't recall what happened at that meeting. I don't think he can testify whether he can turn that material over.

THE COURT: Overruled.

Q Did you personally turn over any information?

A No.

Q Sir, was there any policy in your office to the effect that police officers were not to turn over information to any outside source other than the squad or the District Attorney's office without permission from the District Attorney?

A That is correct. T hat was the policy.

Q Did you abide by that policy during 1972 and 1973?

A I certainly did.

Q Sir, is it fair to say, then,that to your knowledge the only persons who had access to the information received from the electronic surveillance of Louis Ostrer were the team members in your squad on this investigation?

MR. DERSHOWITZ: Objection, your Honor.

THE COURT: He hasn't really finished the question, I suppose . Why don't you just tell us who had access to them during 1972 and 1973.

Q Who had access to the information received?

A Just the team investigating it.

Q And the District Attorneys?

THE COURT: Who were they?

THE WITNESS: Myself, Detective O'Rourke, Police Officer Maguire and Detective Finley.

Q And a number of other members --

A And a number of other members that worked on the investigation.

MR. PEDOWITZ: Your Honor, if I showed the witness the list --

THE COURT: Yes, show him the list.

Q I am showing you a document which has previously been marked in evidence as Government's Exhibit W. I ask you, sir, whether these are the members of the District Attorney's office and the members of your squad and the superiors who had access to this information: John Fine, Mr. Scotti, Inspector Vetrano, Detective Gleason, Assistant District Attorney Campriello, Police Officer Maguire, Detective Finley, Detective O'Rourke, Detective Brennan, yourself, Sergeant Garabedian, Detective Collins, Detective DeCastoli, Detective Brech, Detective Johnson, Detective

Hoffman, Detective McCarthy, Detective O'Donnell and Detective Rozzano.

A That is correct, that is the team.

Q Now, sir, is it fair to say, then, that to your knowledge the only persons that had access to information received from the electronic surveillance were the team members, District Attorneys Fine, Campriello and their superiors, your superior officers and on that one occasion when Assistant United States Attorney Maguire was in your offices, that was the full scope of the people who had access to the information?

A That is correct.

MR. PEDOWITZ: No further questions, your Honor.

THE COURT: Anything else?

MR. DERSHOWITZ: Just one further question.

REDIRECT EXAMINATION

BY MR. DERSHOWITZ:

Q You indicated that you had almost no memory at all of the meeting in December 1972.

Can you tell us definitely whether you did or did not speak any words at all at that meeting from your own memory now?

A I really don't recall.

MR. DERSHWOITZ: No further questions.

MR. PEDOWITZ: Just one further question, your Honor.

RECROSS EXAMINATION

BY MR. PEDOWITZ:

Q Sir, would you have advised Mr. Maguire, the Assistant United States Attorney, of any substance which you had overheard on those wiretaps or bugs without the permission of Mr. Fine at that meeting?

MR. DERSHOWITZ: Objection, your Honor. Would you --

THE COURT: I think he has already testified as to his custom and practice or his rule. He testified he abided by the rule and he tells us also he doesn't remember whether he said anything at the meeting or not.

Isn't that a fair description of what the record shows?

MR. PEDOWITZ: That is a fair description, your Honor.

THE COURT: Let's not go any further with it.

MR. PEDOWITZ: I have no further questions, your Honor.

THE COURT: You are excused.

(Witness excused)

(Movant's Exhibits 1 and 8 received in evidence)

MR. DERSHOWITZ: Detective O'Rourke is our next witness.

J O H N J. O' R O U R K E, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DERSHOWITZ:

Q Detective O'Rourke, were you personally involved with the bugging or wiretapping of Mr. Louis Ostrer during the relevant period between October of 1972 and January of 1973?

A I was professionally involved as a New York City detective in the investigation in which Louis Ostrer entered. That investigation is identified as Case 365 of 1970.

Q Can you generally describe your duties and responsibilities in that investigation?

A My duties and responsibilities, as I recall them, in connection with that investigation differed from the time the investigation commenced in 1970 until the time period to which you just referred.

At that time, that is the fall of 1972, commencing in October, my duties were for the most part confined to coordinating data, issuances of subpoenaes, et cetera, et cetera, in connection with an earlier phase of the investigation in the office of the District Attorney.

Q Did you participate in any way in plant operatins and plant monitoring and listening to wiretaps?

A I recall that in the fall of that year I was assigned maybe once or twice to the Ostrer phase of the investigation in that capacity.

Q Now, did there come a time in December of 1972 that you attended a meeting with Assistant United States Attorney Maguire and Assistant District Attorney Fine?

A Subsequent to October 25th of 1972 I recall being in John Fine's office at a time when Mr. Maguire was present.

Q When you say subsequent to October 25, 1972, are you saying approximately shortly thereafter like in October?

A No, I do not believe it was October, I believe it was November or December.

Q Could you be more specific, was it in November?

A I cannot say with specifity as to when exactly it was. I can say that it was subsequent to October 25th.

Q Would you say that it was at the latest late November, early December?

MR. PEDOWITZ: Objection, your Honor. We know when the meeting was.

THE COURT: We do, but the attorney is entitled to investigate within reason the recollection of this witness. Overruled.

A My best recollection, sir, is that the meeting with Mr. Maguire was in December of '72 before Christmas.

Q Do you recall whether Mr. Maguire was in the office on more than one occasion or on just one occasion?

THE COURT: Prior to January 1973, January 26th?

A I have only seen Mr. Maguire one time in my life.

THE COURT: And that was that occasion?

THE WITNESS: And that was that occasion.

Q Can you tell us who else attended that meeting?

A Factually I can recall at least one other person in addition to Mr. Fine, Mr. Maguire and myself were in that office when that meeting was held. I do not factually recall who that person was.

Q Could it have been Detective Brennan to your knowledge?

A It could have been.

Q Could it have been Detective Finley to your knowledge?

A It could have been.

Q Could it have been both?

THE COURT: Do you recall which one?

THE WITNESS: I do not recall which one.

Q Could it have been both of them or could it only have been one of them?

A My best recollection is that the meeting included one other person, at least one other person.

Q Do you recall any discussions leading up to the decision to have that meeting?

A I recall, sir, that prior to the meeting -- I am thinking like a week or ten days, possibly, some discussion was had wherein I deduced that a meeting had been established and an appointment made for Mr. Maguire to come to Mr. Fine's office.

Q So it is your testimony that, what, a week or ten days -- I'm sorry, I didn't catch the time?

A My recollection is that it was in the recent past preceding the meeting.

Q Approximately a week or ten days prior thereto you recall that there was a meeting set up.

A That's my best recollection.

Q Now, were you invited to attend that meeting?

A No, I do not think that I was formally invited in that my duties required me on most days to be present in Mr. Fine's office, that no invitation was formally tendered to me.

Q Did you have a desk in Mr. Fine's office?

A A second desk was located in Mr. Fine's office and I frequently available of that facility.

THE COURT: Did he have a practice to direct you when he had a person visiting him to either stay in the office or leave?

THE WITNESS: Yes, sir. If he wished my presence during a meeting he would state.

THE COURT: And if he didn't state you would leave when he had a visitor?

THE WITNESS: Yes, sir.

THE COURT: All right.

Q Do you recall speaking at that meeting at all?

A Beyond being introduced to Mr. Maguire I recall taking no part in the meeting.

Q Did you take any notes of the meeting?

A No, sir, I did not.

Q Do you recall whether Mr. Fine took any notes at the meeting?

A I do not recall specifically what Mr. Fine did during the meeting with respect to any notations.

Q Now, I would like simply for you to limit your answer to yes or no on this.

Do you recall the substance of what was discussed at that meeting?

A If I am to interpret the word "substance" in its common definition, yes.

Q Now, did you participate in any discussions with Mr. Fine in which the decision was made to have that meeting?

MR. PEDOWITZ: Objection, your Honor. Irrelevant.

THE COURT: Well, he could answer it yes or no. I will take that.

A Not specifically, sir.

Q Did you convey to Mr. Fine personally any information which derived from the Ostrer wiretape or bug?

A In the course of my duties with respect to that investigation I daily communicated with Mr. Fine

about relevant matters of the investigation. Not specifically with respect to Mr. Ostrer, but with respect to the prior targets of the investigation.

Q Where did you learn this information from?

A I learned this information from my more than two years assignment to the case, from being directly involved in the electronic surveillance of other targets earlier at other locations and from observations conducted in the street, which was part of my duty to perform, et cetera, et cetera.

Q Did you ever serve as a conduit of information between the monitors who were serving on the Ostrer bug or wiretap and Mr. Fine?

A Only insofar as other individuals assigned to the investigation would request me to convey a particular fact to the assistant DA who might be otherwise engaged.

Q So on occasion somebody who actually did the overhearing on the bug or the wiretap would say to you would you tell John Fine that today I heard the following and then you would convey that to John Fine?'

A No, sir.

Q Would you explain your earlier answer, then. Under what circumstances did you act as a conduit for information between the monitors and Mr. Fine?

A Yes, sir. Data derived directly from electronic surveillance was provided to Mr. Fine on what were known as plant reports. Data derived by investigators on the case from physical, photographic or other types of surveillance was provided to Mr. Fine either by observation report or in the case of photographic evidence by the pictures and occasionally a detective assigned to a street assignment in connection with the investigation would call me to seek my advice, for example, on whether or not a particular name had entered the investigation at an earlier time or whether a particular person was known to frequent a particular location, et cetera, and on occasion such individuals would, if they could not reach Mr. Fine, advise me to tell Mr. Fine that a particular individual had met with a target of the investigation. That was the nature of my assignment.

Q Do you recall at the meeting which you stated you attended in Mr. Fine's office, do you recall Mr. Fine saying to Mr. Maguire in words or substance the following:

"Louis Ostrer has something on a witness named Aubrey Moss"?

MR. PEDOWITZ: Objection, your Honor. No foundation. If Mr. Dershowitz wants to know what was said at the meeting he ought to ask.

THE COURT: I will overrule it. He can answer it.

A No, I do not recall Mr. Fine communicating in that language to Mr. Maguire.

Q Could you tell us to the best of your recollection what Mr. Fine communicated to Mr. Maguire at that meeting.

A It is my recollection, Mr. Dershowitz, that Mr. Fine spoke to Mr. Maguire with Mr. Maguire on two issues, in each case briefly.

The first issue was with respect to a gentleman identified as Jim Lynch.

THE COURT: Yes. Does Jim Lynch have anything to do with this motion?

MR. DERSHOWITZ: Yes.

THE COURT: All right, go ahead.

A It is my recollection that Mr. Fine conveyed to Mr. Maguire in substance that he was aware of a man by the name of Jim Lynch who may be an agent of the FBI or possibly an ex-agent of the FBI and that this man was or had an association with Louis Ostrer.

Q Now, is it fair to say that what Mr. --

THE COURT: Let him finish his prior answer. He said there were two issues.

A That could present a security problem.

The second issue involved a name, a person, Aubrey Moss. Similarly on that issue and also in brief form Mr. Fine conveyed to Mr. Maguire that he was aware that this Mr. Moss, Mr. Moss' anticipated testimony in a federal prosecution involving Louis Ostrer might be compromised. That is my recollection in substance of what Mr. Fine conveyed to Mr. Maguire.

Q Is it fair to say from your recollection of the conversation that day that Mr. Fine told Mr. Maguire the name of the investigator who was then working for Mr. Ostrer in connection with his federal case?

A That is not so, Mr. Dershowitz.

Q Did you not say here now that Mr. Fine told Mr. Maguire that a Mr. Jim Lynch was working for Mr. Ostrer?

A That is not so.

Q Will you tell us what you did say about whether Mr. Lynch was working for Mr. Ostrer?

A The record will reflect what I have said and if you wish me to repeat it I will do so.

Q I will do so.

A It is my recollection that Mr. Fine conveyed to Mr. Maguire that he was aware of a person named Jim Lynch who he, Mr. Fine, believed was either an agent of

the FBI or possibly an ex-agent of the FBI and that this Mr. Lynch had an association with Louis Ostrer and that that situation couldpresent a security problem for the U.S. attorney.

Q Did Mr. Maguire ask Mr. Lynch what the nature of the association was?

THE COURT: You mean Mr. Fine, did he ask Mr. Fine.

Q Mr. Fine.

A Mr. Maguire did not in my presence ask Mr. Fine what the nature of the investigation was.

Q The nature of the association.

A Or association.

Q Did Mr. Fine volunteer to Mr. Maguire in any way, in words or substance, the fact that Mr. Lynch was working as an investigator for Mr. Ostrer?

A No.

THE COURT: Does the word "volunteer" bother you in that last question? Did he say to him in words or substance, that Lynch was working as an investigator for the defendant Ostrer?

THE WITNESS: No, sir. Mr. Fine did not say that. It is not recollection that Mr. Fine didnot know that, sir.

Q Did you know at the time that Mr. Lynch was working as an investigator for Mr. Ostrer?

A No, sir, I did not know who Mr. Lynch was.

THE COURT: You thought he might still be an FBI agent?

THE WITNESS: Or an ex-FBI agent or anybody of any other occupation. We just did not know.

Q Did you regularly read the plant logs and listen to the tapes of the Ostrer wiretap or eavesdropping?

A I to the degree that time and opportunity permitted read the plant reports.

Q Did you ever see reference to the investigator Jim Lynch in the plant logs or on the tapes?

THE COURT: Did you listen to the tapes? You see, that was a double-barreled question, the last one.

A I listened to some of the tapes, again when time permitted.

THE COURT: This is prior to the meeting that was held with Mr. Fine and Mr. Maguire?

THE WITNESS: From the commencement of the electronic surveillance which was October 25th.

MR. PEDOWITZ: Your Honor, we are willing to concede that Mr. Lynch to our understanding was working

as a private investigator for Mr. Ostrer.

THE COURT: Yes, but that isn't the question. He is examining this witness as to his knowledge.

Q It is your testimony, then, that to your knowledge you did not know that Mr. Lynch was working as a private investigator, and you did say that to your knowledge Mr. Fine did not know that Lynch was working as an investigator for Mr. Ostrer, is that your testimony?

THE COURT: I heard his testimony. Frame another question, and let me say something to you, Mr. Pedowitz. Just standing up doesn't register an objection. You have to say I object because the record doesn't show that you stood up.

MR. PEDOWITZ: I understand. I didn't wish to interrupt you.

THE COURT: All right, let's go on.

Q Did Mr. Fine say anything else to Mr. Maguire other than that there was a connection or an association between Mr. James Lynch and Mr. Ostrer?

A My best recollection is that Mr. Fine was very, very brief in what he stated to Mr. Maguire and in fact it was my recollection after the meeting, and I think I expressed this comment to Detective Brennan, that I didn't understand why Mr. Fine invited Mr. Maguire to

his office and tell him so little.

Q You said that to Mr. Brennan?

A That's my recollection, that I expressed words to that effect to him.

Q So now you are changing your testimony and you are indicating that you are certain it was Mr. Brennan who was at the meeting and not Mr. O'Rourke?

MR. PEDOWITZ: Objection, since he is Mr. O'Rourke.

THE COURT: The form of the question is bad and he is Mr. O'Rourke.

Q Are you now testifying thatyou are certain it was Mr. Brennan rather than Detective Finley who was attending that meeting?

MR. PEDOWITZ: He testified that he thought Detective Brennan was at the meeting, but he couldn't recollect.

THE COURT: The attorney just inferred by the examination just now that Detective Brennan was at the meeting.

A It is my recollection that when I made the comment to Mr. Brennan that the meeting had already terminated and I cannot recall that I even made the comment in Mr. Fine's office.

Detective Brennan and I had been long time partners and associates and were both assigned to similar capacities in the investigation.

In that context I made the remark to Detective Brennan.

Q But you are certain that Detective Brennan at least knew that the meeting had occurred?

A My recollection is that I did express this view to Detective Brennan and I presume that he knew that th e meeting had occurred. Whether he recalls it or not --

THE COURT: After you spoke he certainly knew it, didn't he?

THE WITNESS: Yes.

THE COURT: Let's go forward.

Q Did Mr. Fine say to Mr. Maguire in your presence that he, Fine, could could not tell Mr. Maguire the source of the information relating to Lynch and to Moss?

A My recollection is that Mr. Fine conveyed to Mr. Maguire that he did not wish co discuss the source of the information.

Q Did Mr. Maguire ask him what the source of the information was?

A Not directly to my knowledge.

MR. DERSHOWITZ: I would like to mark this Exhibit 9.

(Defendant's Exhibit 9 marked for identification)

Q Will you identify this as your handwriting.

A I can state factually that some of the entries on this sheet of paper are in my handwriting and I can further state that other entries are not.

Q Is the name Detective O'Rourke in your handwriting?

A Yes, sir.

Q Okay.

THE COURT: Now, you don't have to comment on his answer. I will judge whether his answer is okay or not. This business of asking a question, getting the answer and then saying okay to a witness, I don't see any basis for doing that. You are a teacher of young lawyers and you should know better.

MR. DERSHOWITZ: I don't teach trial practice, your Honor.

THE COURT: Maybe you should.

Q There is a notation, is there not, that says 1550 and it indicates that there is a call between Mr. Ostrer and Mr. Brown in which there is a discussion of

who Mr. Ostrer is retaining as his attorney in the case, is that not correct?

THE COURT: Is the question whether this entry is his handwriting?

MR. DERSHOWITZ: Whether the entry correctly reflects what I just stated.

THE COURT: That I will have to determine. YOu can ask him if he made the entry.

Q Did you make the entry?

A No, sir.

THE COURT: The entries speak for themselves once they are in evidence.

Q This is not your handwriting?

A No, sir.

Q Were you at the plant when this call came in to your knowledge?

A It is possible that I was. I do not recall, sir, nor does the sheet reflect.

Q Can you tell us whose handwriting this is?

A I do not know, sir.

Q Do you recall hearing the conversation in which the possible retention of attorney Roy Cohen was discussed on a tape that you overheard?

THE COURT: Is that relevant?

MR. DERSHOWITZ: It is.

THE COURT: Did he retain Roy Cohen?

MR. DERSHOWITZ: That's the point. There was long discussion as to who should be retained and who was reported. The discussion is not recorded yet it is logged according to our information.

THE COURT: I ought to take an offer of proof about Roy Cohen. I don't see that that is relevant at all.

MR. PEDOWITZ: Your Honor, we overheard a discussion about retaining Roy Cohen and also retaining Mr. Edelbaum, who was actually retained, on the tapes.

If Mr. Dershowitz wants to play that for your Honor, that's perfectly fine, and it is recorded.

MR. DERSHOWITZ: What we are basically trying to establish here, and it is not his handwriting, which we have no way of knowing --

THE COURT: I have no objection to your asking whose handwriting it is.

MR. DERSHOWITZ: There were conversations which were not in fact recorded which were reported .

THE COURT: We know that and the testimony so far is that they put in the plant report the substance of what they did not record. Is that true?

THE WITNESS: I can't respond yes or no to that.

THE COURT: Were you ever manning the plant?

THE WITNESS: I spent one day and I think and an hour on another day at the plant.

THE COURT: What did you do with respect to conversations not recorded when you were manning the plant?

THE WITNESS: Your Honor, when I was assigned to that particular plant, any conversation that came over the wires was recorded.

THE COURT: You never had the practice of not recording and yet making memoranda?

THE WITNESS: I never made a practice of non-compliance with the requirements which were to record.

Q Is it your testimony now that it was your practice always to record all material that came over the speaker?

A It is my testimony, sir, that with respect to the plant --

THE COURT: This particular plant.

A This plant on Mr. Ostrer's premises, that with respect to the two days that I was assigned, anything that I heard is recorded on the tapes from that plant.

Q It is your testimony, then, that the following never occurred: You would listen to the beginning of a conversation, decide it was not relevant, turn off the recorder and keep on the speaker for any period of time?

A No, sir, that is not my testimony.

Q Okay, would you tell us what your testimony is in that respect.

A My testimony is that when I turned on the recorder to determine if a conversation was legally within the confines of that which should be recorded I would record it and if my judgment was that it was not so in such a category I turned off the recorder.

Q Is it not true that you sometimes used the opposite technique, that is you would listen to the beginning of a phone conversation, determine it was relevant and only then turn on the recorder after you heard but did not record some of the conversation?

A That is not so.

THE COURT: This man was only here for a day and a part of another day, is that right?

MR. DERSHOWITZ: Two days.

THE WITNESS: One day and one hour.

MR. PEDOWITZ: Your Honor, I again renew my objection to this whole line of questioning since what is

relevant is only what was turned over to the federal government, not what was heard by the state, but simply what was turned over to the federal government.

THE COURT: I think we have been down the road on this before, Mr. Pedowitz. I will overrule the objection based on that ground.

I think, however, if this man was there only for a day and one hour, unless something happened on that day that is significant we should not waste time with it because what he did is not necessarily evidence of what Mr. Brennan did or what Mr. Finley did or what somebody else did.

MR. DERSHOWITZ: I am trying to impeach the credibility of this witness at this point and I would like to ask him one further question.

THE COURT: As to what?

MR. DERSHOWITZ: As to his testimony regarding his modus operandi. I think we can establish by these logs that he has pursued a practice different from the one he stated on the witness stand.

THE COURT: For one day and one hour?

MR. DERSHOWITZ: For the whole time he was on the logs.

THE COURT: As I understand it he was only

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there for one day and one hour.

MR. DERSHOWITZ: If he testified his modus operandi was A and it turns out it was B, it casts upon his credibility.

THE COURT: What is the day?

MR. DERSHOWITZ: November 8, 1972 is one of the days.

Q May I ask you whether --

THE COURT: What is the other day? Is it before November 21st?

Q Do you recall whether it was before November 21st, the other day? Were these consecutive days?

A No. My recollection is that the days were sometime apart, maybe a week. The 7th and 8th, I think.

Q That would place it generally before that date.

Can you identify this as your handwriting?

THE COURT: The number, please.

MR. DERSHOWITZ: Exhibit 9.

A May I see it, please?

Q Yes.

A That is my handwriting.

Q Can you tell us what you meant by the initials N/R?

A Yes, sir. Not relevant.

Q Did you ever use it to mean not recorded?

A I answered the question. Not relevant.

Q Whatdid you use to indicate not recorded?

A I don't think I had an occasion to make such an entry, sir.

Q So it is your testimony here today that --

THE COURT: I heard his testimony. None of this repetitious questioning. I heard every word the man said.

Q Any matter logged on this plant log would be reflected on the actual recording of the tape itself?

A At the time that the conversation occurred.

Q Let me try to put it a different way.

As you described your method of working it is not possible that we could have an entry in a plant log that was not reflected by an actual recording, is that correct?

MR. PEDOWITZ: Your Honor, anything is possible.

THE COURT: No, he can understand the question. He is talking about his practices on one day and one hour.

A My practice, sir, was to record on the tapes that which I heard and to make appropriate entries on the

plant report that would reasonably reflect what was on the tape.

THE COURT: Is there anything on the plant report that is not on the tape at the time that you were there, when you were operating the plant reports?

THE WITNESS: Your Honor, the plant reports, from my recollection and from seeing this particular report, should reflect reasonably so what the tape contains.

THE COURT: In other words, you would not listen to a conversation, summarize it in the plant report but not record it?

THE WITNESS: Summarize what report?

THE COURT: Please listen to my question. Did you ever listen and summarize but not record?

THE WITNESS: No, sir.

THE COURT: All right, we have covered one hour and one day here. Let's go on.

MR. DERSHOWITZ: No further questions of this witness.

THE COURT: Anything of this witness, Mr. Pedowitz?

MR. PEDOWITZ: Yes, your Honor, I have a few.

CROSS EXAMINATION

BY MR. PEDOWITZ:

Q Detective O'Rourke, while the bugs and the taps were installed on Louis Ostrer's phones and his office, did you at any time communicate any information contained thereon or in the reports, plant reports, to any federal officer?

A No.

Q Did you limit your conversations about what was on the plant reports and what was on t he tapes to the District Attorneys who were in charge of the case and your fellow officers on the team in this investigation?

A Combined with my superior officers, yes, sir

Q Sir, was that a policy of which you were aware in the District Attorney's office that you were as a police officer not to communicate any information contained on the tapes or learned as a result of this investigation to any person outside of the District Attorney's office or outside of your testimony without the prior approval of the District Attorney?

A Absolutely.

Q Is it fair to say, then, sir, that aside from this one instance in which Assistant District Attorney

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Fine communicated certain information to Mr. Maguire of the U.S. Attorney's office, that the only persons that had access to information received from the electronic surveillance of Louis Ostrer were members of the District Attorney's office and members of your team and their superior officers?

A Until the conclusion of the electronic surveillance.

Q Which was sometime in February of 1973?

A With respect to Mr. Ostrer, yes.

MR. PEDOWITZ: I have no further questions, your Honor.

THE COURT: Anything else for this witness?

MR. DERSHOWITZ: No further questions of this witness.

THE COURT: You are excused and I will resume at 2:15.

(Witness excused)

THE COURT: We will be in recess.

Before I go I am informed by a clerk that there are a number of officers out there waiting. I think you ought to speak with them and if you can stipulate what their testimony would be you could shorten their

hearing. I am told some of these people didn't work at the plant for more than a day or so.

MR. DERSHOWITZ: We would be happy to do that.

THE COURT: This man was there for one day.

MR. DERSHOWITZ: He was at the meeting.

THE COURT: I understand that, but as to the plant, if you could stipulate it would be helpful.

MR. DERSHOWITZ: We will be happy to do that.

THE COURT: Why don't you see what we have to do because I would like to finish.

All right, 2:15.

(Luncheon recess)

AFTERNOON SESSION

(2.15 p.m.)

MR. DERSHOWITZ: We would like to call Officer Garabedian.

THE COURT: Have you been able to stipulate as to any of the officers being excused, those with no real connection in this matter?

MR. DERSHOWITZ: We have indicated a number of officers that we have no further intention of calling, but I take it the Government would like to call them.

MR. PEDOWITZ: I would put them on simply to ask them whether or not they communicated anything with any federal official. The question I have repeatedly asked all of the witnesses, your Honor.

Mr. Dershowitz does not wish to stipulate that if I asked those questions they would state that they did not turn anything over --

MR. DERSHOWITZ: I am prepared to stipulate that that would be their testimony. I am not prepared to stipulate as to the truth of that testimony, obviously.

THE COURT: If that is in issue, and I don't know why you say "obviously," because I assume the federal people don't talk to every single detective or policeman with the City Force, they go through channels; they talked

with Fine and those persons that Fine had at the meeting with him.

But if there is an issue as to credibility, I cannot determine the credibility of the stipulation, so I would have to observe the witness.

MR. DERSHOWITZ: Your Honor, we have no intention of calling those witnesses.

Unless the Government thinks it has to bolster its case on this, I don't see why that --

THE COURT: I don't know that the Government is necessarily called upon to prove the negative. If there is believable testimony by one person, that is just as good as 20.

I am not going to instruct either of you how to proceed. It is just my wish that all these people not be kept tied up too long. We will have to go forward the best we can.

Bring in Sergenat Garabedian.

MR. PEDOWITZ: Your Honor, you know that I would not overburden the Court --

THE COURT: I am not criticizing anybody.

MR. PEDOWITZ: Thank you, your Honor.

THE CLERK: Garabedian is not here yet.

THE COURT: Some of them have not apparently

returned from lunch.

Which one do you want, ODonnell or Razzano?

MR. DERSHOWITZ: We have no intention of calling Razzano, and we did want to call O'Donnell, so I guess we can put him on very briefly.

THE COURT: Bring on Mr. O'Donnell, please.

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J O H N J. O ' D O N N E L L , Shield No. 1027, Detective, District Attorney's Squad, New York County, called as a witness, being first duly sworn, testified as follows:

MR. DERSHOWITZ: Your Honor, I have only one or two questions relating to this machine. Would it be more convenient to have him come to the machine?

THE COURT: Yes. If you want him to inspect the machine he can walk down to it.

Mark the machine for identification.

(Movant's Exhibit 10 marked for identification.)

DIRECT EXAMINATION
BY MR. DERSHOWITZ:

Q Is this machine similar to the one that you used in your monitoring duties?

A Not really. It is a different series, just the same manufacturer. I believe they used Tanbergs on that. It is similar in size and shape, but the locations

of some of the knobs and stuff is different.

Q It is similar in the sense that it has a volume control, off and on and pause mechanisms and a speaker?

A Yes.

Q And relating solely now to the bug, as distinguished from the wiretap --

THE COURT: I think the witness can return to the stand.

MR. DERSHOWITZ: There is just one further inquiry.

THE COURT: Ask him about the machine.

MR. DERSHOWITZ: Right, your Honor.

Q Relating to the bug, the bug would be operating at all times, there would be no indication, would there, that conversation was beginning to occur as there would be, for example, with the telephone tap where you would get a light when the phone was rung; is that correct?

A No.

Q It is not correct?

A No. I'm not certain of this, but I believe that on the machine we used there was a volume indicator with a needle and you could see on this little window type thing here, you could see a needle that would bounce up and back, back and forth to indicate that there were voices

or activity or sound in the room.

Q Sound in the room. In other words, you could tell whether there was sound in the room?

A Yes, sir.

Q But you certainly could not tell by looking at the window who was conversing?

A No.

Q When this machine has its volume up and this mechanism which is --

THE COURT: No more about the machine.

Put him back on the stand. I don't have to put up with this.

Come on, get back up here, Mr. O'Donnell.

If you can't answer it from the stand then I will entertain an application to let you go down into the courtroom.

Q Let me ask you this --

THE COURT: Let the record be clear that he does not say this is the same machine, or even the same model number of machine.

Q It is true that during the recess you did show us how you operated your tape, using -- you volunteered to go over to that machine to show us you operated your monitoring by using that machine, is that correct?

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THE COURT: It doesn't matter. Let's frame a question about this case.

Q The question is simply this, now, as to the bugging device, is it not true that when this machine, or the machine you used, was in the pause position, that is, when the carriage was on and the volume was up, and the matter was on pause, you could hear through the speaker of that machine conversation without recording that conversation; is that correct?

A No, sir. You'd have to pull down those two levers.

Q I'm saying, to repeat again, when the two levers are pulled down and the matter is on the pause position, and the volume is up, is it not true that you could then listen to conversation without having that conversation recorded?

A Yes, that's possible.

MR. DERSHOWITZ: No further questions.

THE COURT: This is in reference to the bug?

Q It is also true with reference to the wiretap, is it not?

A Yes.

THE COURT: Both the bug and the wiretap?

THE WITNESS: Yes.

THE COURT: All right.

MR. DERSHOWITZ: No further questions of this witness.

CROSS EXAMINATION

BY MR. PEDOWITZ:

Q Detective O'Donnell, while the bugs and wiretaps were installed on Louis Ostrer's phones and office, did you at any time communicate any information obtained from the bugs and the wiretaps to any federal officer?

A No, sir.

THE COURT: Or employee?

THE WITNESS: No, sir.

Q Was there a policy in your team and in your squad at the time not to communicate any information outside of the team or outside of the Assistant District Attorneys in charge of the investigation without prior approval from the District Attorney's office?

A Yes, sir.

Q Did you abide by that policy?

A Yes, I did.

MR. PEDOWITZ: No further questions, your Honor.

MR. DERSHOWITZ: No further questions of this witness.

[1.05]

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THE COURT: You are excused.

(Witness excused.)

MR. DERSHOWITZ: We would like to now call former Assistant U. S. Attorney John Fine.

THE COURT: See if Mr. Garabedian is there.

I am informed that only Mr. Razzano is present.

MR. PEDOWITZ: Perhaps we could call Mr. Razzano for a moment and I can --

THE COURT: We will take him out of order as your witness.

MR. DERSHOWITZ: We are not calling him.

THE COURT: I will take him as the Government's witness, just to save time.

- -

D O M I N I C K R A Z Z A N O , called as a witness by the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PEDOWITZ:

Q You are a detective with the Police Department?

A Police officer, that's correct.

Q Police officer.

A That's correct.

Q Sir, during 1972 and 1973 did you participate

in an investigation of, among other people, Louis Ostrer?

A That's correct.

Q Was the Federal Government, to your knowledge, a participant in that investigation?

A Not to my knowledge, no.

Q Did you know, sir, that bugs and wiretaps were installed in the offices and on the phones of Louis Ostrer?

A Yes, I did.

Q While the bugs and taps were installed on Louis Ostrer's phones and office, did you at any time communicate any information obtained from those bugs and taps to any federal officer or employee?

A No, sir, I never did.

Q Sir, was there a policy in your team and in your squad not to divulge any information obtained from a wiretap or a bug to any person outside of the team, without the prior approval of the District Attorney?

A That's correct.

Q Did you abide by that policy?

A Absolutely.

MR. PEDOWITZ: No further questions.

MR. DERSHOWITZ: No questions.

THE COURT: You are excused.

(Witness excused.)

MR. DERSHOWITZ: Your Honor please, in the event that some more time transpires between now and the time the witnesses appear, we would be happy to begin playing the relevant tapes to save the Court's time.

THE COURT: Let's see if there is someone outside.

MR. PEDOWITZ: I can't imagine it would be more than a moment or two, your Honor.

THE COURT: I don't like to waste the time.

MR. PEDOWITZ: I understand that, your Honor. The elevators are often the problem, your Honor, as you know, the elevators cause cause havoc.

- -

J O H N F I N E , called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DERSHOWITZ:

Q Mr. Fine, you are currently employed as an attorney in the State Department?

A Yes, I am with the United States Department of State in Washington.

Q During the years 1972 up through the relevant time, January, 1973, you were an Assistant District Attorney in Manhattan?

A That's correct, yes.

Q And you were in charge of the Ostrer investigation for that office?

A That's correct, yes.

Q Did there come a time in January, 1975 when you submitted an affidavit, prepared and submitted an affidavit in the Federal District Court in the Southern District of New York in connection with Mr. Ostrer's motion for a new trial?

A I submitted an affidavit, yes, I did.

MR. DERSHOWITZ: I would like to have the affidavit marked as an exhibit.

THE COURT: It is on my docket. Don't mark it. Just state the date of it for the record.

Q Is that your affidavit, or a copy thereof?

A It is, yes.

Q What is the date of it?

THE WITNESS: January 8, 1975.

THE COURT: As far as I am concerned, that affidavit is only available for purposes of impeachment. Unless you are prepared to stipulate that that would be his testimony, both of you, I would like you to just examine him about the issues in this case.

MR. DERSHOWITZ: That is what I am prepared to do.

THE COURT: The affidavit is only available to you for impeachment.

MR. DERSHOWITZ: I simply wanted to establish that it was his affidavit, your Honor.

TBE COURT: Is there any question that it is his affidavit?

MR. DERSHOWITZ: No, but there are matters in there which we would like to question him about that may have been omitted from that affidavit.

Q Now, did you keep a diay when you were an Assistant District Attorney in Manhattan?

A I did.

Q Do you have that diary with you?

A I do. Not for all of the years, but for the years 1972 and 1973.

Q And can you tell us what you normally entered into that diary, what kinds of entries were made?

A It would vary. Generally, entries about cases, dispositions, interviews, matters related to the performance of the work as an Assistant District Attorney.

Q And did you normally take notes of important meetings that you attended with other attorneys?

A I did.

Q Did you in fact take notes of the meeting that

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you had with Assistant District Attorney Maguire in December of 1972?

A I did.

Q Have you looked at your diary to refresh your recollection as to any matters for preparation of this testimony today?

A I have looked at the diaries,

MR. DERSHOWITZ: May we see the diaries, your Honor?

THE COURT: I would limit the examination of the diaries to those entires having to do with Mr. Ostrer.

MR. DERSHOWITZ: That's all we would care to look at, particularly as of the time period around the 21st of December.

Q Can you show us those entries, please.

THE WITNESS: Do you want me to read the entry?

Q No, I would like to examine them, if I can.

A For December 21, and there is also an entry for December 22.

THE COURT: Have you seen these, Mr. Pedowitz?

MR. PEDOWITZ: I have, your Honor.

MR. DERSHOWITZ: May we have a moment to examine

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them?

THE COURT: Why don't you read them into the record.

How lengthy are they?

MR. DERSHOWITZ: Quite short, your Honor.

If you don't bring them out he will. I might as well get them now and get on with the case.

MR. DERSHOWITZ: I can't read them.

THE COURT: Let the witness read them.

A Entry made 21 December, 1972, your Honor. I will read the abbreviations in full form, my shorthand notations for conference would be "conf", for examine, "Conference with Mr. Scotti re DAOS case and our obligation to inform federal officials re: matter in their jurisdiction. Mr. Scotti called Mr. Morse, U. S. Attorney, re: matter not in their jurisdiction. He then called Sil Mollo at U. S. Attorney, Southern District, who returned call at 12.35 p.m. and indicated the import of our information. Mr. Mollo, Chief Assistant, said the Assistant U. S. Attorney will contact me directly."

That is the end of the notation for December 21, 1972.

A notation made for December 22, 1972 reads as follows:

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"Conference with Skip Harold Maguire, U. S. Attorney, re DAOS case, see note. Detectives O'Rourke, Finley, Brennan present. Source not revealed. Office telephone number 264-6570."

Q When were these entries made, to the best of your recollection?

A At the termination of whatever conferences are described in the notation.

Q These were contemporaneous, done on the same day as the events occurred?

A That's correct.

MR. DERSHOWITZ: We would like to move the admission of the relevant pages of this diary into evidence and seek permission of the Government to obtain a photocopy fo our own use of the relevant entries.

THE COURT: Is there any question about whether he read them accurately, or about the meaning of the abbreviations?

MR. DERSHOWITZ: No. But we would like to have an opportunity to study some of these more cryptic references that are hard to get the full import of immediately.

MR. PEDOWITZ: I have a photocopy which I can offer as Government's Exhibit A, because I previously

marked it, and if Mr. Dershowitz wants a copy at some subsequent point I will make a Xerox as opposed to having Mr. Fine give up copies of his diaries.

THE COURT: It is duplicative and unnecessary.

Let me see that diary. I don;t see that there can be any real dispute as to the abbreviations the man uses. They are relatively commonplace.

Exhibit A will be received in evidence.

(Government's Exhibit A was received in evidence.)

BY MR. DERSHOWITZ:

Q Have you recently had an opportunity to read all the entries during the months of October through January, inclusive '72 to '73, to determine whether there are any other entries which are in any way relevant to the Ostrer matter?

A Well, I odn't put my interpretation on what you may consider relevant.

THE COURT: Conversations with federal officials concerning Ostrer, let's narrow the question.

THE WITNESS: I found a couple of entries that I think may be of some interest to you.

On March 28, 1973 and on April 18, 1973, referring to this --

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THE COURT: I don't know that I need those. This trial was concluded before Judge Edelstein on January 26; whatever damage was done was done prior to that time.

I am not saying you can't tell him privately, but I am not going to slow down my record by listening to later material.

Next question, please.

MR. DERSHOWITZ: Your Honor, I am trying to read --

Q If you can help me with one phrase "and indicated to . . ." --

A "The import . . ." --

Q ". . . of our information to Mr. Mollo. . ." --

A No, that is a new sentence.

"Mr. Mollo, Chief Assistant, said the Assistant U. S. Attorney will contact me directly."

Reading from the December 21 entry.

Q I am looking at the previous sentence.

"He then called Sil Mollo," that Mr. Scotti then called Sil Mollo, at U. S. Attorney's office, who returned call at 12.30 p.m. and Indicated import of our info -- I would like to clarify, if you recall, what you mean, who indicated to whom the "import of the info," was it Mollo to Scotti or Scotti to Mollo?

A Mr. Scotto is relating the import of the information in the possession of the District Attorney's office to Mr. Mollo.

Q So that on the day before the meeting occurred, you have a notation indicating that there was a telephone conversation in which the import of the information was conveyed from Mr. Scotti to Mr. Mollo, if I understand that correctly?

A Yes.

Q Do you have with you any other notes that you took relating to this conversation, this meeting between -- either the phone conversation that you described or the actual meeting between Mr. Maguire and yourself?

A No.

Q You did testify that you took notes of such a meeting?

A That's correct.

Q Could you describe whether the notes were fairly extensive?

THE COURT: That is a meaningless question. His idea of extensive and yours and mine could be three different things.

Just tell us what notes you made and what did you do with them.

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THE WITNESS: I would have made contemporaneous notes in the course of conversation with Mr. Maguire which would have been part of the case file.

Q What would you normally have done with such notes in the normal course of business?

A They would have been inserted in the case file.

Q So you did insert your notes into the case file?

A You asked me what I would normally have done in the general course of business. Yes, that is what I would have normally done.

Q Do you recall in this case whether you departed from your normal procedure and did something else with the notes other than put them in the case file?

A I have no specific recollection, no.

Q Did you recently have occasion to look for your notes of that meeting for preparation for this testimony?

A Yes, I did.

Q Did you find the notes?

A I did not.

Q You have not to this day been able to locate the notes you took of that meeting?

A I have not, no.

THE COURT: Where did You look for them?

THE WITNESS: At the District Attorney's office at 155 Leonard Street.

I looked at a couple of file drawers labeled Salerno matter and certain of the Salerno case records involving the investigation.

MR. PEDOWITZ: For the record, may it reflect that I advised Mr. Dershowitz of this fact this morning, that Mr. Fine had attempted to find his note of this conversation and thus far has been unable to find it.

THE COURT: And he would expect to believe that in the ordinary course of events that it would be in the Salerno file, is that correct?

THE WITNESS: Yes.

Q Do you have any other ideas as to which files these notes may appear in?

A No, I don't. I noticed that there has been a reorganization of the files in the District Attorney since the time of my leaving, so perhaps it is one of the reasons why I can't find the particular paper that I was trying to find.

THE COURT: When did you leave?

THE WITNESS: 1973.

THE COURT: What month?

THE WITNESS: I believe it was in June.

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BY MR. DERSHOWITZ:

Q We have just been talking about the notes you took of the meeting itself on the 22nd. You mention in your diary the 21st and some phone calls. Did you also take notes relating to the phone calls between Mollo and Scotti?

A No, I don't believe so.

Q Is there, when you went back to check your files, did you find an Ostrer file?

A There was a file drawer labeled Oster.

Q You checked through that and were not able to find the notes either?

A I checked through the tiles that were made available to me and I just didn't find them, no.

Q Can you just approximate how much time you spent looking for the files?

A Well, several hours on Friday.

Q Now, you --

MR. PEDOWITZ: Also for the record, the files are closed on Saturday and Sunday. That is my understanding.

THE COURT: I don't see any significance in that at all.

Do you believe you exhausted the search?

THE WITNESS: I can't say, your Honor. They have broken up the files and have moved them. I just can't tell the Court for the record -- I can tell the Court for the record that I have had no success in locating them.

Q Did you make any effort to locate those notes when you prepared your affidavit in January of 1975?

A No. Of course I was out of state.

Q In January of 1975 did you have access to your diaries when you prepared this affidavit?

A So far as my recollection goes, my diaries were here in New York. But I can't tell you whether I made any telephone call to find out what the entry was or not. I don't believe so. no.

Q Did there come a time when you were told by plant monitoring agents that there were conversations overheard and logged between one Louis Ostrer and one Aubrey Moss?

A Told or whether I received them in report form, I'm not entirely clear at this time, but I believe there were conversations between Ostrer and Moss.

Q Did there come a time when you listened to those conversations yourself on tape recordings?

A There may have been. At this point I cannot recollect directly.

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Q Do you recall whether anybody told you that there were conversations between Mr. Ostrer and Mr. Moss and described those conversations to you orally?

A I have no specific direct recollection of that.

Q Do you recall ever reading plant logs reflecting conversations between Mr. Ostrer and Mr. November?

A I would have read --

Q Mr. Ostrer and Mr. November relating to Mr. Moss?

A I would have --

MR. PEDOWITZ: If all of these questions have been about Mr. November and Mr. Ostrer, then we ought to begin at the beginning because the questions asked were whether or not he overheard conversations with Ostrer and Moss.

THE COURT: I think the record is fairly clear what the questions are.

On one occasion counsel said November when it was apparent to me, and I am sure to the witness, hat he meant Ostrer, and he modified his question before the witness answered.

I don't think the witness has been confused.

Next question, please.

Q Do you recall how it first came to your attention that there were recordings of conversations between Mr. Ostrer and Mr. November regarding a potential witness in the federal case named Aubrey Moss?

A Not specifically.

Q Do you recall when you learned about those conversations?

A At this time, no.

Q You don't recall whether you listened to the tapes themselves or whether you read the logs of the tapes?

A I can't say now with any specificity, no.

Q Do you recall at some point learning that Mr. Ostrer and Mr. November had something on Mr. Moss?

THE COURT: He meant that they possessed derogatory information concerning Mr. Moss.

A Yes.

Q Do you recall also hearing at some point that Mr. November and Mr. Ostrer --

THE COURT: I think these questions ought to be limited to prior to some point or including December 22, 1972.

Q Some time between November 1 and December 22, 1972, do you recall learning from one source or another that Mr. Ostrer and Mr. November had discussed what tactics

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they would use in the event Mr. Moss took the witness stand in his case, in the Ostrer case?

A I'm sorry, without any refreshment so far as dates are concerned, I won't be of much help to you.

I can't fill you in on dates unless you have the conversation or something to refresh me.

Q I am only asking about dates to set a limit.

Do you recall at any time prior to your meeting with Mr. Maguire hearing the conversation, reading the log, or learning about tactics that Mr. Ostrer and Mr. November were planning to use in the event that Mr. Moss took the witness stand against Mr. Ostrer in the federal criminal case?

MR. PEDOWITZ: I object to the --

THE COURT: Sustained.

Q Do you recall having any discussion as to whether or not Mr. November and Mr. Ostrer were planning to use a particular witness to take the stand in the event that Mr. Moss took the stand in the federal criminal prosecution?

A My recollection is that they were going to use certain derogatory information to blackmail this witness that would have testified, I believe, against Mr. Ostrer's interests.

Q Were you told by a plant log monitor that they were going to blackmail him?

A Being told by a person as opposed to --

Q Listening to the tapes.

Did you yourself personally hear anything or read anything which led you to conclude that Mr. Ostrer or Mr. November were planning to blackmail Mr. Moss?

A I may have, yes.

Q Could you describe to us what it was you heard which led you to reach that conclusion?

A As I recall, there was a conversation overheard pursuant to the Court orders between Mr. November and Mr. Ostrer, where they discussed using derogatory information over a Mr. Aubrey Moss, or Moss Aubrey, who was then a witness or a proposed witness in the federal case.

Q Do you recall also hearing a discussion as to whether that information would be admissible in evidence at the federal trial?

A As I said, I don't recall whether this information came to me by reading it in a report or orally.

MR. PEDOWITZ: Your Honor, I object to this line because the best evidence of what is onthe tape is the tape itself, and your Honor will have an opportunity to listen to that.

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THE COURT: That of ocurse is true, however, this witness may be examined as to his knowledge of what took place and what he knew at all times prior to and including December 22, 1972.

MR. PEDOWITZ: Perhaps then Mr. Dershowitz will refresh the witness' recollection with the transcript or the tape.

THE COURT: Let him try his own case.

Next question, please.

BY MR. DERSHOWITZ:

Q Who told you, to your recollection, that a blackmail plot was in the offing?

A As I mentioned, I don't know that anyone told me. It may have been something that I read in the reports that the detectives would personally turn over to me.

Q Would it be fair to say that you read every report between November 1 and December 22 which purported to recount conversations between Mr. November and Mr. Ostrer relating to Susan Gold and Aubrey Moss?

THE COURT: Or Aubrey Moss.

A At this point in time I can't tell you with any degree of certainty that I read every one, or any particular one with specificity.

THE COURT: Did you have a practice of reading the plant report the next day?

THE WITNESS: Yes, your Honor.

THE COURT: Was that regular practice on your part?

THE WITNESS: It was, your Honor.

THE COURT: What was your practice with respect to listening to the tapes during November and December, 1972?

THE WITNESS: I'd listen to a tape recording if the plant report indicated an important conversation or a conversation that I wanted to have full text insofar as intonation, innuendoe, voice tone would be concerned.

Q There came a time in late December when you applied for an extension or an expanstion of the search warrant to include conversations between Mr. November and Mr. Ostrer relating to Aubrey Moss; is that correct?

A An eavesdropping extension?

Q Right.

THE COURT: That is what he means.

A If you have the dates and my application, I'd say that's correct.

Q And is it fair to say that to the best of your recollection that prior to the time that you got an

extension of the scope of the warrant you did not have any Court authorization to overhear conversations between Mr. November and Mr. Ostrer relating to the preparation for the federal trial?

MR. PEDOWITZ: Objection, your Honor.

THE COURT: Sustained on the ground it has been stipulated for the purposes of this hearing that all of this eavesdropping is unlawful.

I don't see why you want to go into that. If there is an offer of proof concerning that aspect of it, I will take an offer of proof, but I thought it had been agreed to.

I can't hear You, Mr. Dershowitz.

MR. DERSHOWITZ: It has been agreed that this is all unlawful.

THE COURT: What are you going to examine him on that for?

MR. DERSHOWITZ: We are trying to establish a multiple unlawfulness --

THE COURT: Unlawfulness in any degree is sufficient for my purposes.

MR. DERSHOWITZ: Fine, your Honor.

Q After learning about certain conversations between Mr. November and Mr. Ostrer relating to Mr. Moss,

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you had intensive discussions in your office concerning that, is that correct?

A Yes.

Q Can you tell us with whom you had those intensive discussions?

THE COURT: No more intensive discussions.

I don't want to take those words or characterization.

MR. DERSHOWITZ: I'm sorry. Those are his words taken from his affidavit.

THE COURT: They mean nothing to me or to you or to any trier of the fact.

If he had a conversation, you can bring out the content of the conversation. Whether it was lengthy or short or important or unimportant, or intensive or whatever the opposite is, let's go forward.

MR. DERSHOWITZ: Thank you, your Honor.

Q It is a fact that you had discussions relating to this information within your own office?

A That correct.

Q Can you tell us with whom you had those discussions?

A Mr. Scotti, the Chief Assistant District Attorney.

Q What did you tell Mr. Scotti?

A Well, we discussed the fact that coercion of a witness of the Federal Government was about to, or it seemed that they were going to call in the case involving Mr. Ostrer, was in the offing.

Q Did you play for him any tapes?

THE COURT: Mr. Scotti, that is?

Q Mr. Scotti?

A I just can't recall that.

Q Do you recall whether you showed him any logs?

A I'm sorry, I don't recall that.

THE COURT: I think by logs he means the plant reports.

Did you show him the plant reports?

THE WITNESS: I have no specific recollection, your Honor.

Q Was the exclusive source of your information about the alleged obstruction of justice or coercion of a witness, was the exclusive source of that information either the tapes themselves or the plant logs?

A Well, I can't say that with any specificity at this time.

Q There may have been other sources of information?

A Possibly.

Q They might have been plant monitors themselves?

A It is conceivable.

Q Other than the plant monitors, the logs and the tapes themselves, were there any other sources of information leading you to conclude that an obstruction of justice and coercion of a witness or a blackmailing plot was in the office?

A Not that I can think of at this time.

Q You did not have any other sources of information, you did not have anybody who was telling you things about what was going on in Mr. Ostrer's office?

A Well, recall now that we had an electronic bug in Mr. Ostrer's office, I think, at that time and telephones were being monitored.

Q What I am really asking is, is it fair to say that everything you knew about any allegations concerning an obstruction of justice would be reflected on the tapes, the plant logs or in the memory of the monitoring agents, that the sole source of the information was the wiretap and bug?

A It would seem to be a correct statement.

THE COURT: Do you have some doubt about that?

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THE WITNESS: Well, I can't recall whether -- there could have been something else that occurred at the time, whether someone told me in connection with one of the detectives' investigation at the time or -- that is my only hesitancy, or whether it came to me in the form of reports.

(Continued on next page.)

Q Now, you had a discussion with Mr. Mollo as you mentioned and what precisely did you tell him to the best of your recollection.

A Mr. Scotti.

Q Mr. Scotti, I'm sorry.

A Mr. Scotti had a telephone conversation with Mr. Molly.

Q No, I am talking about your personal discussions with Mr. Scotti. What did you tell him?

A What did I tell Mr. Scotti?

Q Yes.

A Well, I outlined the situation that was occurring.

THE COURT: No, just give us the substance of what you told him.

A Well, I can't recall in great detail, but I stretched the fact that it appeared that Mr. November and Mr. Ostrer were in the process of blackmailing or engaging in coercion of a witness that the federal government was to use in connection with a trial of Mr. Ostrer.

Q Did you also communicate to him any information about one Jim Lynch?

A I can't recall, but that name comes into my memory as being someone we thought or may have thought at

that time had links with the defendant and organized crime and also had some federal connection in some way, either as a federal agent -- to the best of my recollection now.

Q Can you tell us now the source of your information that Mr. Lynch may have had connections with organized crime?

A Excuse me.

Q You did testify, did you not, that at that time you thought that Mr. Lynch may have had some connections with Mr. Ostrer and with organized crime.

I am now asking you if you recall what the source of your information was that Mr. Lynch may have had connections with organized crime.

MR. PEDOWITZ: Objection, your Honor. That is not what he testified to. That Mr. Ostrer may have some connections with organized crime.

THE COURT: I did not understand him to so testify nor do I think that it is weighty on the scope of the hearing, besides which you are asking him to give up a confidential informant, someone who told him Lynch was connected with organized crime.

Is that what you are asking?

MR. DERSHOWITZ: No. What I want to establish is that all of his information relating to Mr. Lynch in

fact came from the tapes, the logs, because then --

THE COURT: Is that so?

THE WITNESS: I can't say that,your Honor.

THE COURT: Can you tell us the type of source? In other words, was it these wiretaps or these plant reports that caused you to believe that Mr. Lynch had some connection with organized crime, or was it something else without specifying what the something else is?

THE WITNESS: I can't say, your Honor. Not at this time.

THE COURT: You can't say or you don't know?

THE WITNESS: I can't say. At this time I would have been able.

THE COURT: You can say because I will direct you to say.

THE WITNESS: I don't know. There was a time that I did know, but at this time I don't recall.

Q Did there come a time when it came to your attention that there was a Mr. Lynch, a Jim Lynch, who was working for Louis Ostrer as an investigator?

THE COURT: Prior to December 22nd. On or prior to December 22, 1972.

THE WITNESS: Can you repeat your question,

please?

Q Did there come a time prior to December 22, 1972 that you learned from any source that Jim Lynch was working for Louis Ostrer as an investigator?

A I can't be particular insofar as dates or times are concerned. I tell you now I still have an impression that this man, the name Jim Lynch is familiar to me and it was our impression that he had some connection with Mr. Ostrer and we were concerned about a security leak insofar as our wiretaps and bugs were concerned.

Q Did you at any time check to see whether or not Mr. James Lynch was at that time an employee of the Federal Bureau of Investigation?

A I am not sure.

Q Would it not have been a matter of simply picking up a telephone--

THE COURT: No questions like that. They are argumentative. Let's get on. There are other witnesses waiting to be heard.

Q Did you make any inquiry to determine when and whether Mr. Lynch had worked for the FBI at any point in time?

MR. PEDOWITZ: Objection, your Honor.

THE COURT: Overruled, but I will limit the

the question to prior to January 26, 1973.

A I can't recall.

Q Would it surprise you to learn that Mr. Lynch had resigned from the FBI in --

THE COURT: His surprise is not relevant. I won't take it. I don't know what you are trying to do here. Time is precious. It is absolutely irrelevant to this story whether he would be surprised by something you might say in March of 1976. It is absolutely unimportant to me.

Next question. I think you are stringing this out.

MR. DERSHOWITZ: Your Honor, we certainly are not intending to.

THE COURT: Whether he is surprised, annoyed or amazed is of no interest to me at all. Next question.

Q Who else did you meet with prior to your meeting with Mr. McGuire other than Mr. Scotti?

MR. PEDOWITZ: Your Honor, I object. I just don't see the relevance to anything that does not have to do with the transmission of information to the federal government.

THE COURT: I think that is what the question is meant to elicit, so please reframe the question.

Q Was anybody else in attendance at your meeting with Mr. Scotti or did you have any other meetings with any other people prior to your meeting with Mr. McGuire about this matter?

MR. PEDOWITZ: Objection, your Honor.

THE COURT: Yes, it is a compound question. Objection sustained.

Q Prior to your meeting with Mr. McGuire did you have any other meetings with any members of your staff in which you discussed whether or not to disclose this information to the federal government?

MR. PEDOWITZ: Objection, your Honor.

THE COURT: Why can't he answer that one yes or no?

MR. PEDOWITZ: Your Honor, it seems to me that the relevance of this witness' testimony is as it relates to what was turned over to the federal government.

Whether he had ten, twenty or one hundred discussions with other detectives --

THE COURT: Objection overruled.

A I believe that the first meeting in connection with a decision whether we could, whether we should turn this information over to the federal authorities occurred with Mr. Scotti on the 21st of December in 1972.

Q You do not recall any meeting about a week or ten days prior to your meeting on the 21st or 22nd of November in which you had such discussions?

A I don't recall.

Q Do you recall stating in your affidavit that after intensive discussions in our office we concluded that it was necessary to disclose to the federal authorities our fear that an obstruction of justice might be underway?

A It is part of my affidavit, yes.

Q Can you describe to us approximately the amount of time you spent in discussions leading up to the decision whether or not to disclose this to the federal government?

MR. PEDOWITZ: Objection.

THE COURT: You see, he signed the affidavit, Mr. Pedowitz, and he can be examined as to the time that those so-called intensive discussions occupied. That is a legitimate question.

The objection is overruled.

A I can't give you any specific --

THE COURT: Was it a day, a week, a month?

THE WITNESS: How long the discussion took place?

THE COURT: Yes.

THE WITNESS: I would say it certainly took less

than an hour, certain although I have certainly no recollection as to how long it took.

Q In those discussions was the question raised by anybody, by you or any of the other participants as to the problem that might be created if you disclosed to the federal government information that you obtained as the result of the wiretapping?

A We were very concerned that it might create a security problem for our own investigation, but on the other than we had an ethical commitment to prevent a miscarriage of justice through the tampering of a witness.

Q Can you answer my question? I asked you whether or not at any point there was any discussion about the problems that would be created as a result of you disclosing to the federal government matter which you learned as a result of wiretapping?

A The two aspects of the problems in that vein I have just related to you.

First, the ethical consideration that any lawyer has to allege a miscarriage of justice through the tampering with the witness, number one, and number two, our own problem, the problem within the criminal justice system of not having a leak with sensitive information.

THE COURT: Are you trying to tell us or do you intent to tell us you believe if you disclosed the information by wiretap, that that word might get back somehow to the objects of your investigation and they would stop talking on the phone?

THE WITNESS: That was one of our concerns, plus the statutory mandate that we have that prevents disclosure of wiretap information, except only under certain circumstances.

Q Were you actually concerned that Mr. McGuire might go back and tell Mr. Ostrer that he was the subject of a wiretap?

A Our concern was just as I related it to you. That it would create a security problem for an investigation, especially in light of this impression or information that we had that there was an investigator, we thought at that time, tied to federal authorities that was involved with Mr. Ostrer.

Q And there was no discussion about the constitutional problems that might be faced in the federal prosecution if they received wiretap information from the state wiretap?

MR. PEDOWITZ: Argumentative.

THE COURT: Wouldn't you delight to hear

an answer? The question again is almost as silly as the objection. I am going to sustain the objection to save time. Next question.

What kind of an answer do you think this witness is going to give you to that?

MR. DERSHOWITZ: I expect that the answer would be yes. I think any responsible lawyer would of course consider the grave constitutional questions of turning over wiretap information to the federal government.

THE COURT: Isn't it true that you thought these wiretaps were lawful at the time you had your discussions with McGuire?

THE WITNESS: Yes.

Q Were you aware at the time that the conversations did involve Mr. Julius November, who was a lawyer?

A We were aware that Mr. November was a lawyer, yes.

Q Were you aware that there is a federal -- I'm sorry, let me withdraw that question.

Were you aware that the actual wiretap authorization under which you were operating specifically excluded conversations between lawyer and client?

A Participation by a man in a crime simply because he is a lawyer doesn't clothe him with any exemption.

THE COURT: Lots of lawyers think otherwise, don't they.

All right, let's go forth.

Q Were you not aware at the time that you made the decision to meet with the federal government that there could at least be some question as to whether or not that conversation was privileged?

A I believe these questions were covered in the wiretap orders themselves.

Q Which questions?

A Questions of legality.

Q Were covered by the original wiretap authorization?

A If that's what you are asking me.

Q That's what I am asking.

MR. DERSHOWITZ: May we see the original wiretap authorization?

THE COURT: Let's go on. They are in evidence.

MR. DERSHOWITZ: May I represent that the original wiretap authorization specifically excluded lawyer-client conversations and did not exclude Ostrer and November.

THE COURT: I have no doubt about that. What I permitted you to ask was about this man's state

of mind.

MR. PEDOWITZ: May I also make a reference to the fact that in the December 22nd amendment and extension of the order Mr. November and Mr. Ostrer's conversations were specifically permitted to be overheard. This rhetoric actively permitted the state government to overhear those conversations.

MR. DERSHOWITZ: That has no bearing on this.

THE COURT: Since if they were all unlawful anyway I don't know what difference it makes.

MR. DERSHOWITZ: And it has no bearing --

THE COURT: I permitted you to ask about his state of mine. Let's go forward and continue to examine this witness. No sidetracks.

Q On December 22, 1972 there was a meeting in your office; who attended that meeting?

A You are referring to the meeting with Skip, Harold McGuire, the assistant U.S. attorney?

Q Yes.

A I was present, Mr. McGuire was present, I believe Detectives Finley, O'Rourke and Brennan were also present.

Q Are you testifying as to the later three from

your current memory or by looking at your diary entry or by a combination of the two?

A Simply having refreshed myself from the diary entry.

Q It is your current recollection, however, that those three officers were at the meeting?

A No, I am afraid I have to rely on what I entered in my diary at the time.

Q So it is not recollection refreshed --

THE COURT: That is what he just told you. Next question.

Q I'm sorry, I just didn't understand one point that I would like to clarify.

THE COURT: He told you he is relying on his diary. Reframe your next question.

Q Your current diary does not tell us whether or not Detective Finley was at that meeting?

A No.

Q You are unsure as to whether or not Detective Finley was at that meeting?

A As I said my present testimony is based upon the diary entry where I noted the participants -- where I would have noted the participants at the meeting.

Q On the basis of your current recollection can

can you tell us for certain who you remember being at that meeting in addition to yourself and Skip McGuire?

A No, I am sorry, I can't. Detectives, but I wouldn't be able to tell you which ones.

Q Mr. Mollo was not present at that meeting?

A No.

Q Were people walking in and out of that meeting or was it a stable group?

A I'm sorry, I can't answer that. I don't know.

Q Approximately how long did the meeting take?

A I can't give you a time. I don't recall. It wasn't very long.

Q At that meeting did you disclose to Mr. McGuire the existence of a Mr. Jim Lynch?

Did you tell him about Jim Lynch?

A I am not certain at this time whether I told him about Lynch or not. I tend to think not, but I am not sure. I am really not sure at this time.

Q You think you did not tell him about Lynch. Had you discussed Lynch with Mollo?

THE COURT: At what date?

MR. DERSHOWITZ: Just prior to this meeting. Sometime in the middle of November, but before November 22nd.

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A I never had a discussion at all with Mr. Mollo.

Q I am sorry, I keep --

A At that time.

MR. DERSHOWITZ: I beg your Court's indulgence. I keep confusing Scotti with Mollo.

THE COURT: You are going to offend two people.

Q Do you recall having any conversations with your superior Mr. Scotti relating to Mr. Lynch?

A I don't have any specific recollection of it.

Q But you do recall telling Mr. McGuire that a conspiracy was a foot to blackmail Moss?

A I told him that there was an attempt, as far as I believed, to interfere with a witness by the name of Moss or Berry or Aubrey Moss. I wasn't even entirely sure of the name of the witness at the time.

Q Did Mr. McGuire indicate who that witness was?

A Yes. I believe he said he knew who I meant, but he didn't plan on calling the witness anyway.

Q Did he ask you what the source of your information was?

A He may have asked, but I certainly didn't tell him.

Q If he ask what did you say, how did you respond when he asked if he did what was your source of information?

A I refused to give any answer.

Q You just simply said I can't tell you what my source of information is?

A Or words to that effect, yes.

Q Did he ask you in words or substance is this something you got on a bug or a tape?

A He may have. He was perhaps a little missed but I believe he just wanted to find out what the source was, if my recollection serves me correctly.

Q Before Mr. McGuire indicated that he wasn't going to use him in any way, did you suggest that Mr. McGuire ought to be very careful about using Aubrey Moss as a witness?

A I think I simply related in very short form the facts that there was an attempt to blackmail this witness or engage in coercion and that was it.

Q Did you show him in writing or did this all occur orally?

A Orally.

THE COURT: Did you tell him what the basis of the coercion would be?

THE WITNESS: I am not sure, your Honor. I may

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have told him something about that, but I just can't recall now.

Q Did he tell you at that time why it was that he had decided not to call Mr. Moss as a witness?

A He may have.

Q Can you tell us what reason he gave you?

A Not at this time, no.

Q Did it correspond to the reason that you had given him? Did it in any way relate to an allegation of blackmail or anything of that kind?

MR. PEDOWITZ: Objection, your Honor. He said that he didn't know what the reason was.

THE COURT: I will allow the question. The witness can say if he remembers. The second question asked is allowed.

A Did Mr. McGuire's reason for not using the witness coincide to the blackmail?

Q Yes.

A No. I don't believe so.

Q In other words, the blackmail information that came from you was new information for Mr. McGuire so far as you can tell?

A Well, I didn't ask him anything about it. I simply told him what the situation was and he told me that

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he didn't intend to use the witness anyway. That I think is the gist of it.

Q Did he also tell you that he would keep Mr. Moss under subpoena anyway even though he had decided not to use him?

A I believe there was a concern on our part that the U.S. Attorney might do something that would tip off the defendants to the fact that we were suspicious in one way or another leading them to reveal the bug, so I believe I expressed a concern to Mr. McGuire not to do anything that he wouldn't normally do or perhaps to keep the witness under subpoena, but I don't recall with any great degrees of specifity.

The words that you do mention are familiar to me in some way, though.

Q So you related to Mr. Moss your concern -- to Mr. McGuire your concern that the security of the investigation not be in any way compromised?

MR. PEDOWITZ: Objection, your Honor. Asked and answered.

THE COURT: It is kind of repetitious, but I will let him answer. Sure you did, didn't you?

THE WITNESS: In some forms, yes, perhaps not in the words of the lawyer, though.

THE COURT: Please don't give us these repetitious questions.

Q Did Mr. McGuire tell you at the meeting that he had Mr. Moss under subpoena at that time?

A I am not sure. I believe so.

Q I didn't hear the last.

A I am not sure. I believe so.

Q You left the meeting or he left the meeting and you understood at that time that he would continue to keep him under subpoena even though he had no intention of calling him at the trial?

MR. PEDOWITZ: May we call this off for a moment? Mr. Mollo is in the courtroom.

THE COURT: Mr. Mollo has left the courtroom and the record should indicate he merely came in the door and before he could take a seat he left and I don't believe he heard a word.

How much longer will you be?

MR. DERSHOWITZ: I think we will be a little bit more time with this witness, your Honor.

THE COURT: Are you agreeable to excusing him and taking Mr. Mollo out of order? I take it that is what the request is?

MR. DERSHOWITZ: Yes, if he is very busy we

have no objection.

THE COURT: I am sure he is busy and I am sure he has been busy all his life.

All right, would you stand down and return to the witness room, Mr. Fine.

(Witness temporarily excused)

THE COURT: All right, bring in Mr. Mollo.

S I L V I O M O L L O , called as a witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DERSHOWITZ:

Q In November of 1972 what was your position in the United States Attorney's office?

A I guess I was the chief assistant.

THE COURT: You don't have any doubt about that, do you?

THE WITNESS: No, Judge.

Q Do you recall receiving a phone call from Mr. Scotti, of the District Attorney's office relating to a matter involving a defendant called Louis Ostrer?

A I have no independent recollection of it.

Q Would you have kept notes of that conversations?

A No.

Q Have you had an opportunity to check back to see if you have any matters that might refresh your recollection of any such conversation?

A Well, yes. I just wanted to have my old secretary check my diary to determine whether or not there was anything in my diary that would show a telephone call. Unfortunately he hasn't been able to locate the diaries because in the process of moving from this building into the new building that cabinet apparently got misplaced and they haven't been able to locate it.

But, I can tell you, if this is of any help to you, that in the regular course of my work things like that happen. I would get telephone calls like that from not only this New York County District Attorney's office, but from many offices, those things would clear through me in the normal course of events.

Q But you now have no independent recollection of any communication that you have had involving the Ostrer case?

A Keep in mind I get lots of those calls. I have no way of trying to remember it.

MR. DERSHOWITZ: No further questions of this witness, your Honor.

THE COURT: Wait just a moment. Maybe the

assistant United States attorney would like to cross examine you.

MR. PEDOWITZ: Just one question.

CROSS EXAMINATION

BY MR. PEDOWITZ:

Q Mr. Mollo, if the diaries were to be obtained, would they simply reflect the fact that a conversation occurred as opposed to the substance of the conversation ?

A It would simply show that I received a telephone call. My secretary always made a record of every incoming call and that was just noted, that's all.

MR. PEDOWITZ: No further questions.

THE COURT: Anything else for Mr. Mollo?

MR. DERSHOWITZ: No.

THE COURT: All right, sir, you are excused.

(Witness excused)

THE COURT: Mr. Fine is to resume the stand.

MR. PEDOWITZ: In the interests of moving this along, I also had a call placed to Mr. Scotti so that he would be sure to be here, too. As you know he is also involved in some very important matters right now.

THE COURT: I am sure Mr. Dershowitz will agree to extend the same courtesy to Mr. Scotti.

MR. DERSHOWITZ: Yes.

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THE COURT: I thought he was supposed to be working upstate.

MR. PEDOWITZ: He commutes between the city and upstate, in Buffalo.

THE COURT: Ask Mr. Fine to resume the stand.

J O H N F I N E , resumed.

CONTINUED DIRECT EXAMINATION

BY MR. DERSHOWITZ:

Q Do you recall on approximately April 21st or 22nd receiving information about a phone conversation between Susan Gold and Aubrey Moss relating to Moss' testimony?

A I can't be specific with relation to any dates.

Q After you received your initial communication about the Aubrey Moss matter, the conversation between November and Ostrer, over the next several days or weeks were you told about other conversations between Mr. November and Mr. Ostrer relating to the Moss matter?

A As I say at this point in time I can't recall whether I was told, whether I read plant reports or received detectives' reports.

Q Would it be fair to say that you can maintain the containing interest in the Ostrer-November-November-Gold

matter between the time you first heard about it and the time you had your meeting with assistant United States attorney McGuire?

A I think that's fair to say. That in relation to all of the other matters that concerned the investigation.

Q Did you read any significant entries relating to that matter on the --

THE COURT: No. You see, this witness is speaking here under the penalty of perjury and you are asking him to make a value judgment as to whether something is significant or not. That's not a proper form of question.

MR. DERSHOWITZ: One moment, if your Honor please.

(Pause)

Q At the time of your meeting with Mr. McGuire were you aware that Julius November had acted in a legal capacity in relationship to Louis Ostrer?

MR. PEDOWITZ: Objection, your Honor. It is very, very vague, as to what time, in relation to what.

MR. DERSHOWITZ: I will specify the question.

Q Were you aware at the time that Mr. November was advising Mr. Ostrer in relation to his then pending

federal criminal prosecution?

A As I recall Mr. November and Mr. Ostrer were involved in various schemes. The majority of out interest involved their criminal conduct. It was reflected by the investigation that we conducted.

Q Can you indicate one scheme other than the matter involving Susan Gold to your recollection that Mr. November and Mr. Ostrer were involved in? Just one.

THE COURT: Are we asking this witness to testify about an open matter in the District Attorney's office, New York County?

MR. DERSHOWITZ: I think I can establish in one minute with this witness, your Honor, that's not so.

Q Is it not the fact that Mr. November and Mr. Ostrer were not indicted for any of the charges, alleged charges relating to murder, obstruction of justice, blackmail, union extortion?

THE COURT: Is the statute of limitations expired on all of this alleged conduct?

MR. DERSHOWITZ: I would be happy to ask the witness whether as far as he knows there are any ongoing investigations.

THE COURT: I am not sure I would let him answer.

MR. PEDOWITZ: I would object to that very strenuously.

THE COURT: Whether you did or not, I don't think I would permit this hearing to be used as a means of finding out what ongoing investigations, if any, the District Attorney of New York County has concerning Mr. November or even Mr. Ostrer and it was particularly inappropriate when you realize this witness doesn't work there any more.

MR. DERSHOWITZ: Well, let me rephrase the question.

Q Could you answer the question yes or not without revealing any information.

Do you recall any criminal matter discussed between Mr. November and Mr. Ostrer when you either heard the tapes or read the logs unrelated to the alleged obstruction of justice involving Mr. Moss?

A I don't --

THE COURT: Aren't the logs all in evidence?

MR. PEDOWITZ: Yes, they are, and so are the tapes, your Honor.

THE COURT: Let's go on. If the plant reports which we have erroneously been referring to as logs can show anything that can be cited by either of you and if not

the Court will look at them and determine this question.

MR. DERSHOWITZ: No other questions of this witness at this time, your Honor.

THE COURT: Do you have any cross examination for Mr. Fine?

MR. PEDOWITZ: Yes, your Honor.

CROSS EXAMINATION

BY MR. PEDOWITZ:

Q Mr. Fine, this investigation of Louis Ostrer and others, was it begun or continued with any federal assistance?

A It was not.

Q Was it solely a state matter?

A It was.

Q The Rackets Bureau conducted this investigation, correct?

A That's correct.

Q And you supervised the investigation to go with Mr. Scotti and Mr. Campriello, is that correct?

A That's true.

Q And there were members of a team of the Rackets Bureau, Police Officer Squad involved in this investigation also?

A Members of the District Attorney's office squad.

Q That squad was supervised by Sergeant Garabedian, Lieutenant Gleason and Inspector Vetrano?

A Yes.

Q Anybody else?

A There were other supervisors in the squad structure, yes.

Q Sir, did you have a policy in your office that other than the key members, not even other members of the District Attorney's squad should be aware of what is happening in an ongoing investigation?

A Especially in matters involving organized crime,yes.

Q Did you employ that policy in this particular investigation?

A Yes.

Q Did you give instructions to your police officers that they were not to speak to other members of the squad?

A I don't recall any direct instructions. I don't think something like that would have had to have ben said to those men.

Q Now, sir, during this wiretapping and bugging of Louis Ostrer, other than the information that was conveyed to Mr. McGuire, a former assistant United States

attorney, was there any other information obtained as a result of the tapping and bugging that was turned over to a federal officer during the course of the wiretapping or bugging?

A You mean whether we gave to any federal official any wiretap information during the course of the continuation of these eavesdrop orders?

Q Correct.

A No.

Q Did you ever at any time give any of your police officers, members of the squad or members of the team, any authority to communicate any information to any federal officer or official?

A No.

Q Sir, do you consider yourself highly security conscious?

A Yes.

THE COURT: That is great. He considers himself highly security conscious. Is that of any relevance on this hearing, how he considers himself?

MR. PEDOWITZ: I believe it does, your Honor.

THE COURT: I don't think so. He is not competent to describe how he considers himself, or if he

is competent it is not relevant.

Do I understand that when you went to Mr. Scotti with this problem, that he telephoned Mr. Morse?

THE WITNESS: That is correct.

THE COURT: And that was Mr. Robert Morse who used to be the United States Attorney in the Eastern District of New York, is that right?

THE WITNESS: Yes. We didn't know where this case could have been. We knew it was a federal case of some kind.

THE COURT: But you didn't know which district it was in?

THE WITNESS: No, we had no idea.

THE COURT: Mr. Morse told you he had no such case?

THE WITNESS: He spoke to Mr. Scotti.

THE COURT: Was there something about this that made you believe that these matters were pending in the Eastern District of New York, either in Brooklyn or Long Island?

THE WITNESS: Not particularly. I just don't think we knew one way or the other. We didn't even know the correct name or the correct spelling of the name. We thought it was Aubrey More or Aubrey or something.

In fact, looking over one of the wiretap orders I see the name was spelled that way, so we weren't entirely sure of who the witness was correctly.

Q Sir, at your meeting with Assistant United States Attorney McGuire on December 22, 1972, did you reveal to Mr. McGuire the source of the information which you had received?

A No.

Q Was it a deliberate tactic on your part not to reveal that information?

A It was deliberate, yes.

Q Had you instructions from Mr. Scotti not to reveal the source of the information?

A That, too, plus my own judgment in the matter. It wasn't until March 28th of 1973 that Mr. Scotti gave authorization to reveal any information about wiretaps to the federal authorities, Mr. McGuire.

Q That was approximately a month after the electronic surveillance had come to an end, is that correct?

A That was after Mr. Ostrer was taken into custody.

THE COURT: State custody?

THE WITNESS: Yes, your Honor.

Q Sir, you were questioned on direct examination about a Mr. Lynch and you indicated that you were not certain of the source of the information about Mr. Lynch, is that correct?

A That's true.

Q Did you have an informant, a person working this particular case who might have given you that information?

A That's possible. Don't forget now the information may not have come to me directly, it may have come to one of the investigators working on the case and it could have been relayed to me in that fashion. I didn't go out and investigate the matters myself.

Q Sir, you mentioned on your direct examination that --

THE COURT: Please none of that. Just ask him a question.

Q You thought Mr. McGuire might be missed at the meeting. What were the reasons that you thought that Mr. McGuire might be missed?

THE COURT: He said he thought he was missed.

THE WITNESS: That's correct.

Q Why is that, sir?

A We wouldn't tell him anything --

THE COURT: What did he do or say that allowed you to draw the inference he was missed?

THE WITNESS: His tone of voice, insofar as his asking for more information, perhaps.

Q But you did not reveal it, is that correct?

A No, I wouldn't give him any other information.

THE COURT: By missed you mean anger?

THE WITNESS: Yes.

THE COURT: All right.

Q Sir, did you tell Mr. McGuire anything other than the fact that Mr. Lynch might be associated with this particular case or that Aubrey Moss might be tampering in your conversations with Mr. McGuire?

A I think Mr. McGuire wanted permission to look at the indictment folder from Mr.Ostrer's case as I recall. Mr. Ostrer had been indicted Ithink two times in state jurisdiction and for cross examination purposes I believe Mr. McGuire requested permission to look at those indictments.

THE COURT: That is a public record, isn't it?

THE WITNESS: Yes.

THE COURT: And he had to ask you for permission?

THE WITNESS: It's a matter of courtesy, I

suppose.

Q Did you have them readily accessible?

A I don't know whether I had them or the file room had them, but in any case we would make them available to him as we would make them available to any law enforcement officer.

THE COURT: These I take it are old, closed indictments?

THE WITNESS: That is true.

MR. PEDOWITZ: Pardon me, your Honor. I am just reading through my notes. Much of this has been covered.

(Pause)

MR. PEDOWITZ: Your Honor, I understand Mr. Scotti just walked in.

THE COURT: I understand that, but can't you finish with this witness? Have you anything else for him?

MR. PEDOWITZ: I have no further questions of this witness.

THE COURT: Any further questions?

MR. DERSHOWITZ: Yes, I have a few.

THE COURT: Mr. Scotti, would you be kind enough to step outside.

REDIRECT EXAMINATION

BY MR. DERSHOWITZ:

Q All during the time of this investigation, November-December 1972, is it a fact that Mr. Ostrer was on probation from a state court conviction?

THE COURT: What possible difference would that make?

MR. DERSHOWITZ: I think it will come out in about a minute, your Honor.

THE COURT: All right.

A I don't know what period, but I believe he was convicted and placed on probation by the Judge.

(Movant's Exhibit 11 marked for identification)

Q Is it not true that on February 26, 1973 you moved to have Mr. Ostrer's probation revoked precisely on the ground of his federal conviction in the Southern District?

THE COURT: What possible difference would that make?

MR. DERSHOWITZ: I wanted to establish that he in fact knew all during this time that the indictment was in the Southern District and not in the Eastern District.

MR. PEDOWITZ: Your Honor, he was convicted in

January. The testimony related to what happened in December.

MR. DERSHOWITZ: I wanted to establish the scope of his responsibility for the probation revocation.

THE COURT: Hand up the minutes for the probation revocation hearing. Iwill receive the probation hearing in evidence. Go on to something else.

(Movant's Exhibit 1 received in evidence)

Q Now, you mentioned that Mr. McGuire was missed. Did he press you for information about the source of the information?

A I don't know what you mean by pressed.

THE COURT: I don't either. Next question.

Q You testified that the --

THE COURT: No,just ask a question. Don't summarize testimony.

Q The investigation of which you are speaking involved in your view, did it not, a federal obstruction of justice, a potential federal obstruction of justice?

A We call it coercion of a witness, coercion in the first degree.

Q You were aware if your estatment to Mr. McGuire was true there could possibly be a federal obstruction of

justice as well as a state charge, is that true?

A I don't know what I was aware of at the time. Certainly blackmail of a witness would be a federal violation as it would be a state violation. That's coercion in New York State Law.

Q Now, did there come a time in March or April of 1973 when you made rather full disclosure to Mr. McGuire about the sources of your information?

A Yes. I made disclosures more freely to Mr. McGuire.

Q What did you tell him then? Did you tell him there was a wiretap?

THE COURT: Does it matter? Suppose he told him everything he knew

MR. DERSHOWITZ: I am trying to establish, your Honor, that the alleged claim of security was not the dominant concern of the witness, but rather the alleged protection of the federal prosecution.

THE COURT: He told him everything in March, that is conceded, isn't it?

MR. PEDOWITZ: In April, your Honor.

THE COURT: All right, but don't go on with irrelevant things.

MR. DERSHOWITZ: I am delighted with that

concession. No further questions, your Honor.

MR. PEDOWITZ: One further question .

RECROSS EXAMINATION

BY MR. PEDOWITZ:

Q Mr. Fine, by April 1973 is it not a fact that the Ostrer investigation had come to a close in that all the electronic surveillance had ceased, Mr. Ostrer was under arrest and a search and seizure had been made in his offices?

A What you are saying is correct, but the investigation had not yet come to a close, no.

Q In the sense the grand jury investigations were continuing?

A The grand jury investigations where we acted as counsel to the grand jury.

MR. PEDOWITZ: No further questions.

THE COURT: May this witness be excused, now?

MR. DERSHOWITZ: Yes.

(Witness excused)

THE COURT: Please bring in Mr. Scotti.

A L F R E D J . S C O T T I , called as a witness, being first duly sworn, was examined and testified as follows:

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CERTIFICATE OF SERVICE.

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United States Courthouse
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Date: September 13, 1976

Dear sir,

Herewith are 25 copies of the brief and 10 copies of the appendix (in three volumes) for:

Defendant-Appellant

No. 76-1282

UNITED STATES OF AMERICA

v.

LOUIS C. OSTRER

We certify that we have served 2 copies of the brief and appendix upon each other party separately represented, by hand, addressed as follows:

Laurence B. Pedowitz, Esq., Assistant United States Attorney, Office of the U.S. Attorney, One St. Andrew's Plaza, New York, New York 10007

Signed under the penalties of perjury:

George D. Bateman

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Rec'd by mail 9-13-76

BATEMAN & SLADE, INC.

Then personally appeared before me the above named George D. Bateman, of Bateman & Slade, Inc., and made oath that the foregoing is true.

Francis D. Cozza
Notary Public
My Commission expires:
June 18, 1983

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